BROTHERS COLLEGE

INTRODUCTION

TO

POLITICAL SCIENCE

A TREATISE ON THE ORIGIN, NATURE, FUNCTIONS, AND ORGANIZATION OF THE STATE

BY

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To

William Archibald Dunning

A NAME HONORED AMONG SCHOLARS

BROTHERS COLLEGE

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PREFACE

My aim in the preparation of this work has been to provide a text-book for students which, though elementary, shall cover a wider range of topics relating to the state than is usually dealt with in treatises designed for text-book use. With this end in view, I have included chapters on the nature, scope, and methods of political science; on the essential constituent elements of the state; on the functions and sphere of the state; on citizenship and nationality; on constitutions —their nature, sources, and kinds; on the distribution of governmental powers; and on the electorate. I make no pretension to having treated the subject in an exhaustive manner. I have simply attempted to set forth in an elementary way the more important theories concerning the origin, nature, functions, and organization of the state, and to analyze and criticise them in the light of the best scientific thought and practice.

With a view to encouraging students to read as widely as possible, I have placed at the head of each chapter a bibliography of the best literature in English, German, French, and Italian, dealing with the subject treated in the chapter, and have cited many additional authorities in the footnotes.

Proofs of various parts of the book have been read by university professors, each of whom is an authority on the particular subject dealt with in the chapter submitted to him, and the entire work has had the benefit of their suggestions. For this service my thanks are due to Professors J. Q. Dealey, of Brown University; W. F. Dodd, of Johns Hopkins University; Blaine F. Moore, of the University of Michigan; Paul S. Reinsch, of the University of Wisconsin; L. S. Rowe, of the University of Pennsylvania; Walter J. Shepard, of the University of Ohio; D. Y. Thomas, of the University of Arkansas; and W. W. Willoughby, of Johns Hopkins University; to my colleagues, Professors John A. Fairlie, David Kinley, and N. A. Weston, and Messrs. F. C. Becker and Thomas Reed Powell, of the University of Illinois; to Mr. Roy E. Curtis, formerly of the Wisconsin Legislative Reference Bureau; and to Mr. H. G. James, graduate student in the University of Illinois and member of the Illinois bar.

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CHAPTER I

POLITICAL SCIENCE

Suggested Readings: AMOS, "Science of Politics," chs. 1 and 2; BLUNTSCHLI, "Allgemeine Staatslehre," translated into English under the title "Theory of the State," Introduction and ch. 1; also his "Politik," bk. I, ch. 1; BORNHAK, "Allgemeine Staatslehre," pp. 1–8; CALKER, "Politik als Wissenschaft;" DE PARIEU, "Principes de la Science politique," Introduction; FUNCK-BRENTANO, "La Politique," ch. 1; GUMPLOWICZ, "Allgemeines Staatsrecht," pp. 1–13; HELD, "Staatsrecht," pp. 1–21; HOLTZENDORFF, "Principien der Politik," bk. I, chs. 1 and 2; HUHN, "Politik," pp. 9–21; JANET, "Histoire de la Science politique," vol. I, Introduction; JELLINEK, "Recht des modernen Staates," bk. I, chs. 1 and 2; LEWIS, "Methods of Observation and Reasoning in Politics," vol. I, chs. 2–6; MCKECHNIE, "The State and the Individual," Introduction; MILL, "System of Logic," bk. VI, chs. 6–10; VON MOHL, "Encyklopädie der Staatswissenschaften," sec. X; POLLOCK, "History of the Science of Politics," ch. 1; RATZENHOFER, "Wesen und Zweck der Politik," pp. 26–30; REHM, "Allgemeine Staatslehre," in MARQUARDSEN'S "Handbuch des öffentlichen Rechts," Einleitungsband, II, pp. 1–10; ROWE, "Problems of Political Science," "Annals of the American Academy of Political and Social Science," vol. X, pp. 165–186; SCHMIDT, "Allgemeine Staatslehre," vol. I, pp. 1–33; SCHMIDT, "Grundzüge der praktischen Politik," pp. 1–10; SEELEY, "Introduction to Political Science," lect. I; SIDGWICK, "Elements of Politics," ch. 1; MUNROE SMITH, "The Domain of Political Science," "Political Science Quarterly," vol. I, pp. 1–9; WALCKER, "Politik der constitutionellen Staaten," ch. 1; WALTER, "Naturrecht und Politik," pp. 1–20; WILLOUGHBY, "Political Philosophy," "South Atlantic Quarterly," vol. V, pp. 161 *et seq.*; also, "The Value of Political Philosophy," by the same author, "Political Science Quarterly," March, 1900; WOOLSEY, "Political Science," vol. I, pt. II, ch. 1; ZACHARIA, "Vierzig Bücher vom Staate," vol. I, bk. 6. secs. 1 and 2.

I. TERMINOLOGY AND DISTINCTIONS

The Term "Politics"

THERE is as yet no commonly accepted term by which the science of government may be designated. The term "politics" (from *πόλις*, *πολιτεία*), employed by many writers,

is open to the objection that it possesses several meanings and, when used without qualification or discrimination, leads to confusion if not misunderstanding.[1] According to popular usage it is a term of both a science and an art, that is, it is employed to denote both the systematic study of the phenomena of the state and the totality of activities which have to do with the administration of the affairs of state. As a science it furnishes us with a mass of theoretical knowledge concerning the state; as an art it seeks solutions of concrete problems and is concerned with the processes and means by which government is actually carried on and the ends of the state are realized.[2] In a narrow and somewhat partisan sense the term is applied to electioneering methods by which public officials are chosen and political policies promoted.[3]

Theoretical and Practical Politics

"Theoretical" politics is sometimes distinguished from "practical" or "applied" politics, the former being con-

[1] Jellinek has well remarked that there is no science which is so much in need of a good terminology as is political science. "Recht des modernen Staates," p. 129.

[2] Some writers maintain that "politics" as a science is concerned with that which *is* rather than that which *ought to be*, that its sphere is the present and the past; while as an art it looks to the future and aims at that which *ought to be* in the government of communities. See, *e.g.*, Jellinek, *op. cit.* p. 13. For further discussion of the distinction between politics as an art (*Staatspraxis, Staatskunst*) and politics as a science (*Staatswissenschaft, Staatslehre*) see Bluntschli, "Politik" (vol. III of his "Lehre vom modernen Staat.") pp. 1–6; Holtzendorff, "Principien der Politik," chs. 2 and 3; Von Mohl, "Encyklopädie der Staatswissenschaften," p. 543; Funck-Brentano, "La Politique," pp. 38–48; Rehm, "Allgemeine Staatslehre," pp. 9–10; Schmidt, "Grundzüge der praktischen Politik," pp. 1–3; Walcker, "Politik der constitutionellen Staaten," p. 4; and Zacharia, "Vierzig Bücher vom Staate," vol. I, p. 169.

[3] The term was employed as an art in its widest sense by Bluntschli when he said "politics" (*Politik*) is concerned with the whole conscious life of the state and the guidance of its affairs. The term is employed as that of a science by such writers as Holtzendorff in his "Principien der Politik," by Froebel in his "Theorie der Politik," by Dahlman in his "Politik," by Huhn in his "Politik," by Waitz in his "Grundzüge der Politik," and by many others. A singular use of the term "politics" is made by Goodnow in his work entitled "Politics and Administration," where it is employed to denote the activities of the state which have to do with the expression of the state will, in contradistinction to the term "administration," which is concerned with the execution of the state will.

cerned with the fundamental characteristics of the state without reference to its activities or the means by which its ends are attained; the latter, with the state in action, that is, as a dynamic institution.[1] Thus everything that relates to the origin, nature, attributes, and ends of the state, including the principles of political organization and administration, falls within the domain of "theoretical" politics, while that which is concerned with the actual administration of the affairs of government belongs to the sphere of "applied" or "practical" politics. The majority of writers to-day, however, prefer the term "political science" instead of "theoretical" politics; and the simple term "politics," instead of "applied" or "practical" politics. Some writers employ the term "science of politics," [2] others, the "theory of the state," the *Staatslehre* of the Germans, because, as one author remarks, "it gives a clearer idea of the wide nature of the field of inquiry" and at the same time "avoids the necessity of a delicate and intricate discussion as to whether the study of politics is

[1] The distinction between "theoretical" and "applied" politics has been observed by Jellinek, Holtzendorff, Janet, Cornewall Lewis, Alexander Bain, Sir Frederick Pollock and others. See, for example, Pollock, "History of the Science of Politics," pp. 94–95, for the following comparative outline (abridged):

Theoretical Politics.	Applied Politics.
A. Theory of the state (origin, classification, forms, sovereignty).	*A*. The state (existing forms).
B. Theory of government (institutions, departments, order, defense, taxation, positive law).	*B*. Government (constitutional law and usage, parliamentary systems, army and navy, currency and trade).
C. Theory of legislation (objects, general jurisprudence, method and sanction, interpretation and administration).	*C*. Laws and legislation (procedure, laws, courts, precedents, etc).
D. Theory of the state as an artificial person (corporations, international law).	*D*. The state personified (diplomacy, peace and war, treaties, conventions, etc.)

[2] For example, Amos, Bagehot and Pollock.

a science or a philosophy." [1] In spite of all objections, however, the term "political science" (*Staatswissenschaft, science politique, scienza politica*) has come to be more generally employed by the best writers and thinkers to describe the mass of knowledge derived from the systematic study of the state, while the meaning of the term "politics" is confined to that of the business or activity which has to do with the actual conduct of affairs of state.[2]

The Term 'Political Science"

Against the term "political science" the objection has been urged that it does not correspond with the facts, since there is no single science dealing with the state, but rather a group of related sciences, each concerned with particular aspects of it. Thus, it is said, the modern state presents itself under divers aspects and is capable of being studied from many different points of view. The mass of knowledge relating to each phase or aspect of the state has developed a history and a dogma of its own quite distinct from the rest. The phenomena of each have become so numerous and complex as to create a necessity for special treatment by the investigator. Thus the tendency has been to group them into separate categories and treat them as distinct sciences.[3] The plural form, the "political sciences," therefore seems to correspond more nearly with the facts and is preferred by many writers, especially the

[1] McKechnie defends the use of this term. He criticises the use of the term "political science" for the reason that it "often conveys the idea that it is merely a study to be entered upon as a means to party ends, not as a resolute endeavor to find truth for its own sake." The term "science of politics" he finds equally objectionable for the reason that the term "science" is associated with logical and rigorous methods of investigation and experiment applied to such objects as they are adapted to, while the word "politics" is associated with all that is changeable and contingent in the affairs of a nation, rather than with the principles of absolute and universal truth. "The State and the Individual," pp. 28–30.

[2] On the use of technical terms in political science see Lewis, "Methods of Observation and Reasoning in Politics," vol. I, ch. 4.

[3] Compare on this point Dunning, "Political Theories, Ancient and Medieval," p. XXI, and Giddings, "Principles of Sociology," ch. II.

French, who commonly speak of the *sciences morales et politiques*.[1]

The "Political Sciences"

According to the latter view a political science is one which is concerned, not necessarily with the state in all of its aspects or relations, but with any particular phenomenon of the state or any class of phenomena either as a whole or incidentally, directly or indirectly. Thus there may be as many political sciences as there are conceivable aspects or forms of manifestation of the state. In this sense sociology, political economy, public finance, public law, diplomacy, constitutional history, may be denominated political sciences, since they all deal either primarily or incidentally with some class of phenomena belonging to the state.[2] Those who maintain that the singular form accords more nearly with the facts argue that in reality the above-mentioned sciences are rather coördinate social sciences than independent political sciences. Thus, says one writer, in support of this view, "The various relations in which the state may be conceived may be subdivided and treated separately, but their connection is too intimate and their purpose too similar to justify their erection into different sciences."[3] Without attempting to pass judgment upon the respective merits of the two views,

[1] Among those who have defended the plural term may be mentioned Von Mohl, Holtzendorff, Lewis, Dunning, and Giddings. Von Mohl, in his "Geschichte und Litteratur der Staatswissenschaften," published in 1855, vol. 1, p. 126, classified the "political sciences" (1) as general political theory (*Allgemeine Staatslehre*); (2) as the dogmatic political sciences, including public law, political ethics, and the art of politics (*Staatskunst*), including diplomacy, administration, etc.; and (3) as the historical political sciences, including constitutional history and statistics. Von Mohl's classification was adopted in substance by Franz Holtzendorff twenty years later in his "Principien der Politik" (pp. 4–6). A recent attempt to classify the "political sciences" has been made by Von Mayr in his "Begriff und Gliederung der Staatswissenschaften" (1906).

[2] Giddings even enumerates philosophy as one of the "political sciences," *op. cit.*, p. 27. See also his "Province of Sociology," in the "Annals of the American Academy of Political and Social Science," vol. I, p. 66.

[3] Munroe Smith, "The Domain of Political Science," in the "Political Science Quarterly," vol. I, p. 5.

we believe that either form may be justified by distinguishing between political science in its widest and most general sense, and the auxiliaries or disciplines of that science, employing the singular to designate the former and the plural the latter.[1] The former is the general science of the state, the state in the aggregate, the state considered from all points of view; the latter are the special or disciplinary sciences which deal with particular aspects or activities of the state. Such are the sciences of jurisprudence, political economy, public law, sociology, political and constitutional history, etc.

II. DEFINITION AND SCOPE

Definitions of Political Science

It was a saying of a great Roman jurist that all definitions are dangerous because they never go far enough and are nearly always contradicted by the facts. The truth of this observation applies as well to general propositions in political science as to those of the civil law. Nevertheless, it is equally true, as has been well said by a noted political writer, that "to obtain clear and precise definitions of the leading terms is an important achievement in all departments of scientific inquiry."[2] The renowned German scholar Bluntschli defined political science (*Staatswissenschaft*) as "the science which is concerned with the state, which endeavors to understand and comprehend the state in its fundamental conditions, in its essential nature, its various forms of manifestation, its development."[3] Gareis,

[1] See Jellinek (*op. cit.*, pp. 5–6), who points out the necessity of distinguishing between the science of the state in the larger sense of the word, including the science of the law; and the sciences of the state in a stricter sense which may be designated as disciplines; see also Von Mayr, "Begriff und Gliederung," who dwells upon the same distinction.

[2] Sidgwick, "Elements of Politics," p. 19. Compare also Bain, "Deductive and Inductive Logic," p. 547, and Rehm, "Allgemeine Staatslehre," p. 1. For further observations on the value of definitions in political science see Munroe Smith in the "Political Science Quarterly," vol. I, p. 1; Rowe, "Problems of Political Science," "Annals of the American Academy of Political and Social Science," vol. X, p. 23

[3] "Allegemeine Staatslehre," being vol. I of his "Lehre vom mod. Staat," p. 16 Compare also Holtzendorff, "Principien der Politik," p. 10.

another German writer, says "Political science considers the state, as an institution of power (*Machtwesen*), in the totality of its relations, its origin, its setting (land and people), its object, its ethical signification, its economic problems, its life conditions, its financial side, its end, etc."[1] Jellinek, one of the ablest of living European publicists, distinguishes between theoretical political science (*theoretische Staatswissenschaft oder Staatslehre*) and applied political science (*angewandte oder praktische Staatswissenschaft*). Theoretical political science is again subdivided by Jellinek into the general theory of the state (*allgemeine Staatslehre*) and special or particular theory of the state (*besondere Staatslehre*). The former has for its purpose the study of fundamental principles. It considers the state in itself and the elements which constitute it; not the phenomena of a particular state, but the totality of all the historico-social aspects in which the state manifests itself. Furthermore, the dual nature of the state, that is, its character both as a social phenomenon and a legal or juridical institution, furnishes the basis for still another distinction, to wit, that between the social doctrine of the state (*soziale Staatslehre*) and constitutional political theory (*Staatsrechtslehre*). The former deals with the state primarily as a social organization, that is, as a society of individuals organized for common ends; the latter, with the state as a concept of public law, a juristic entity or legal phenomenon.[2]

[1] "Allgemeine Staatslehre," in Marquardsen's "Handbuch des öffentlichen Rechts," Einleitungsband, I, p. 1. Zacharia, one of the early German writers on the state, conceived the province of political science to be "to set forth in systematic order the fundamental principles according to which the state as a whole is to be organized and the sovereign power exercised." "Vierzig Bücher vom Staate," vol. I, bk. 6, sec. 1.

[2] See Jellinek, "Recht des mod. Staates," pp. 9–13. Sir G. C. Lewis subdivided the study of political phenomena into the "science of politics" and the "art of politics," or pure and applied politics, the latter consisting mainly of maxims of political practice. The science of politics he subdivided into three "principal departments." The first has to do with the registration of political facts, gained by observation and

A succinct definition is that of Paul Janet, a distinguished French writer, who conceives political science to be "that part of social science which treats of the foundations of the state and the principles of government."[1] According to Seeley, "political science investigates the phenomena of government as political economy deals with wealth, biology with life, algebra with numbers, and geometry with space and magnitude."[2] Seeley points out that as most of the commonwealths of antiquity were city states, ancient political science was little more than the science of municipal government, a truth which finds illustration in Aristotle's treatise on "Politics," a work practically limited in its scope to the consideration of such polities only as were city states. Modern political science on the other hand is, as has been well said, the science of the national country state and is tending to become the science of the world state. Furthermore, says a well known writer, the modern requirements of territorial expansion, representative government, and national unity have made political science not only the science of liberty but also the science of sovereignty.[3]

Points of Agreement

All of the opinions quoted above are in substantial agreement on the essential point, namely, that the phenomena of the state in its varied aspects and relation-

study. The second, which he denominated "positive or descriptive politics," teaches what "is involved in the idea of political government and corresponds to the statical branch of mechanics. It defines the elements necessary to constitute a government and explains the various forms without passing judgment on their relative merits." The third "department," which he designated as "speculative politics," inquires how certain forms of government or institutions work, seeks to determine from the observed facts and principles of human nature their character and tendency, the operation of laws, etc. "Methods of Observation and Reasoning in Politics," vol. I, pp. 53–59.

[1] Art. "Politique," in Block's "Dictionnaire de la Politique," vol. II, p. 577.

[2] "Introduction to Political Science," p. 18.

[3] Burgess, "Relation of Political Science to History," in Report of the American Historical Association for 1896, vol. I, p. 206. For another view that liberty is one of the "chief subjects" of political science, see Lieber, "Civil Liberty and Self-government," p. 44; also his "Political Ethics," vol. I, bk. II, ch. 13.

ships, as distinct from the family, the tribe, the nation, and from all private associations, though not unconnected with them, constitute the subject of political science. In short, political science begins and ends with the state. In a general way its fundamental problems include, first, an investigation of the nature of the state as the highest political agency for the realization of the common ends of society and the formulation of fundamental principles of state life; second, an inquiry into the nature, history, and forms of political institutions; and third, a deduction therefrom, so far as possible, of the laws of political growth and development.[1] In the process of evolution the appearance of new political conditions may give rise to new problems, but upon close analysis they will be seen to be problems of practical politics rather than fundamental problems of political science.[2]

Political Science and Political Philosophy

The distinction between political science (*Staatswissenschaft*) and political theory or political philosophy (*Staatslehre*, *Staatsphilosophie*) is generally observed by the more systematic writers on the state, though a precise demarcation of the boundary lines which separate them is difficult, if not impossible. Political philosophy is said to be concerned with a theoretical or speculative consideration of the

[1] "The task of political science," says Jellinek, "is to study in their fundamental relations the public powers, to examine the conditions under which they manifest themselves, their end and their effect, to investigate the state in its inner nature." "Recht des mod. Staates," pp. 9–10.

[2] Treitschke, in his brilliant work, "Politik," thus states the problem of political science: "First, it should aim to determine from a consideration of the actual world of states the fundamental concepts of the state; second, it should consider historically what the people have chosen, what they have created, and what they have attained in political life, and the reasons; and, third, through this means, it should determine historical laws and moral imperatives," vol. I, p. 2. Cf. also Willoughby, "The Nature of the State," p. 382. "Generally speaking," says Willoughby, "there are three great topics with which political science has to deal: state, government, law." "Political Science, as a University Study," "Sewanee Review," July, 1906, p. 258. Sidgwick divides the problems of political science into two general divisions: those relating to the organization of the state and those relating to its function. "Elements of Politics," p. 12.

fundamental principles and essential characteristics of the materials and phenomena with which political science has to deal. It investigates the development of political thought, and inquires into the foundations of political authority; it analyzes, classifies, and forms judgments upon the essential attributes of the state and thereby prepares the way for a true political science. It is concerned rather with generalizations than with particulars, and predicates essential qualities rather than accidental or unessential characteristics.[1] Again, it is said that while political science furnishes us with the results of logical thinking upon the nature and forms of concrete political institutions, political philosophy inquires into the foundations of the first principles which underlie them.[2] A few writers make the distinction one mainly of teleology, political science being concerned with what the state ought to be, while political philosophy considers the state as it actually is.[3] But this distinction is not generally observed.

III. IS THERE A SCIENCE OF GOVERNMENT?

Thus far it has been assumed that the study of the phenomena of the state may under proper conditions be treated as a science. To this assumption, however, objections have been raised. Thus, it has been asserted that, on account of the magnitude and complexity of the subject-matter

[1] Willoughby, "Political Philosophy" in the "South Atlantic Quarterly," vol. V, p. 161; also an article by the same author entitled "The Value of Political Philosophy," in the "Political Science Quarterly" for March, 1900. See also Dunning, "Ancient and Medieval Political Theories," p. xvii. The distinction between *Staatslehre* and *Staatswissenschaft* is dwelt upon and explained by Rehm in his "Allgemeine Staatslehre," p. 1, and by Schmidt in his "Grundzüge der praktischen Politik," pp. 1–3.

[2] Compare on this point Huxley's distinction between a science and a philosophy in his "Object and Scope of Philosophy," Essays, vol. VI, p. 57.

[3] This is Sidgwick's distinction. See his "Elements of Politics," p. 7. This opinion, however, is inconsistent with an earlier view of Sidgwick that political science endeavors to determine what ought to be so far as the constitution of government is concerned. "Development of European Polity," p. 2.

relating to the state, — a body of material, says an acute thinker, so rich and varied that, from the beginning, political science has been embarrassed by the weight of its wealth, — it is impossible to apply to it rigorous scientific methods of investigation. Political phenomena, we are told, are characterized by uncertainty, variableness, and a lack of order and continuity.[1] Much of this objection is, however, without weight. If, says Sir Frederick Pollock, those who deny the existence of a political science mean that there is no body of rules from which a prime minister may infallibly learn how to command a majority, they would be right as to the fact, but would betray a rather inadequate notion of what a science is. "There is," he rightly concludes, "a political science in the same sense that there is a science of morals."[2]

The Test of a Science

For our purposes a science may be described as a fairly unified mass of knowledge relating to a single subject, acquired by systematic observation, experience, or reason, the facts of which have been coördinated, systematized, and classified.[3] The scientific method of examining facts is not peculiar to one class of phenomena nor to one class of investigators; it is applicable to social as well as to physical phenomena, and we may safely reject the claim that the scientific frame of mind belongs exclusively to the physicist or the naturalist. Authorities are now generally agreed that the phenomena of the state present a certain connection

[1] Compare Amos, "The Science of Politics," pp. 2–16. Comte denies the claim of "politics" to be ranked as a science because (1) there is no consensus of opinion among experts as to its methods, principles, and conclusions; (2) it lacks continuity of development, and (3) it lacks the elements which constitute a basis of prevision. "Positive Philosophy," Eng. tr. by Martineau, ed. of 1893, vol. II, ch. 3.

[2] "History of the Science of Politics," p. 2.

[3] Compare the definition of "Science" in the Century Dictionary; see also Lieber, "Political Ethics," vol. I, p. 17. "The classification of facts and the formation of absolute judgments upon the basis of this classification," says Pearson, in his "Grammar of Science," p. 6, "essentially sum up the aim and method of modern science." Again, he says, "the classification of facts, the recognition of their sequence and relative significance, is the function of science."

or sequence which is the result of fixed laws, though less immutable, to be sure, than those of the physical world; that these phenomena form proper subjects of scientific investigation; and that the laws and principles deducible therefrom are susceptible of application to the solution of concrete problems of the state.[1] All that is required to give a scientific character to the study of political phenomena is that the inquiry shall be conducted in accordance with a definite plan or system, with due regard to the relations of cause and effect, so far as they are ascertainable, and in conformity with certain well-recognized rules of scientific investigation.[2]

The Consensus of Opinion

The consensus of scientific opinion is in favor of this proposition. Aristotle described "politics" as the master science in the highest sense [3] and in practice he applied scientific methods to his study of Greek polities. The Germans have done more than any other group of scholars, by their profound researches and discriminating analytical methods, to give to it the character of a science. Holtzendorff, one of the most systematic of the German writers, ably defended the claim of politics to be ranked as a science. "With the enormous growth of knowledge," he said, "it is impossible to deny that the sum total of all the experiences, phenomena, and knowledge respecting the state may be brought together under the collective title of political science" (*Staatswissenschaft*).[4] This is the view of Von Mohl, Bluntschli, Jellinek, Ratzenhofer, Treitschke, Sir G. C. Lewis, Sidgwick, Lieber, Woolsey, Burgess, Willoughby and other systematic writers on the state. "*Il y a donc une science de l'état*," says Janet, "*non pas de tel ou tel état en particulier, mais de l'état en général, considéré dans sa*

[1] Compare on this point J. S. Mill, "System of Logic," p. 549.

[2] "Whether there is a 'political science,'" says Huxley, "depends on whether any rational principles can be found to regulate the form of constitutions, the determination of the sphere of the state, which make a complete and systematized branch of knowledge, clearly formulated and understood in their mutual relations."

[3] "Ethics," bk. I, ch. II.

[4] "Principien der Politik," p. 4.

nature, ses lois, et dans ses principales formes."[1] We must conclude, therefore, that both reason and the weight of authority justify the claim of politics to the rank of a true science. It renders practical service by deducing sound principles as a basis for wise political action and by exposing the teachings of a false political philosophy.[2] As a science it falls short, of course, of the degree of perfection attained by the physical sciences, for the reason that the facts with which it deals are more complex and the causes which influence social phenomena are more difficult of control and are perpetually undergoing change.[3] On account of the impossibility of forecasting results with the same exactness and precision possible in the physical sciences, a fully developed science of the state must of necessity remain always an ideal. As yet it is still probably the most incomplete and undeveloped of all the social sciences.[4]

IV. THE METHODS OF POLITICAL SCIENCE

Limitations and Difficulties

Having endeavored to show that the study of political phenomena may under certain conditions acquire the character of a science, we come now to inquire into the processes and methods by which this may be done. First of all, however, we must note the limitations and difficulties

[1] "Histoire de la Science politique," etc., vol. I, p. lxxv.

[2] "Thus," says Sir Frederick Pollock, "political science must and does exist, if it were only for the refutation of absurd political theories and projects." "History of the Science of Politics," p. 4.

[3] Compare on this point Mill, "System of Logic," p. 549; and Ritchie, "Studies in Political and Social Ethics," p. 106.

[4] Buckle, in his "History of Civilization," written in 1857, declared that, "in the present state of knowledge politics so far from being a science is one of the most backward of all the arts" (vol. I, p. 361). Buckle, however, did not deny the possibility of a political science; what he lamented was that so little attention had been given to the study of the state, that as a systematic branch of knowledge it was too crude and undeveloped to be considered as a science. Of the same opinion was Mill, who wrote in 1843, "It is accordingly but of yesterday that the concept of a political or social science has existed anywhere but in the mind of here and there an isolated thinker, generally very ill prepared for the realization." "System of Logic," p. 547.

under which scientific investigation of political phenomena must of necessity be conducted. The material with which the political scientist has to deal is very different from that with which the investigator in the physical sciences is concerned, being of such a character as not to permit of the use of artificial contrivances or apparatus for increasing or guiding our powers of observation or for registering results. Not only must the investigator work without the assistance of mechanical aids, but he is handicapped by the fact that the phenomena with which political science deals do not follow one another according to invariable laws of sequence, but rather at indeterminate intervals, constituting, as a noted writer observes, an "interminable and perpetually varying series."[1] There is an essential difference between physical and social phenomena. The facts of history and social life cannot be reproduced at our volition and made the subject of experiment with a view to determining what is best under a given set of circumstances. Social facts never recur at regular intervals as the manifestations of general forces, but rather as the actions of certain individuals. The facts of natural science are susceptible of evaluation; they are governed by uniform and invariable laws. Each particle of matter is identical with every other of its own kind. An atom of carbon or a molecule of carbonic acid is not different from any other atom or molecule, but the units of the social organism may differ infinitely from one another. There are no general and invariable laws governing social phenomena. Those which have been postulated by the ancient philosophers and some modern sociologists are but vague and glittering generalities.

Not until the eighteenth and nineteenth centuries did the phenomena of the state come to be generally regarded as a proper field for scientific investigation,

[1] George Cornewall Lewis, "Methods of Observation and Reasoning in Politics," vol. I, p. 121.

since which time the literature of the subject has been enriched by the investigations of many scholars, among whom may be mentioned Von Haller, Von Mohl, Waitz, Zacharia, Holtzendorff, and Bluntschli in Germany; Rousseau, Montesquieu, De Tocqueville, and Laboulaye in France; Locke, Bentham, Paley, Lewis, Brougham, Austin, Mill, Seeley, and Sidgwick in England; and Hamilton, Madison, Woolsey, and Lieber in America. Among those who have made special contributions to the methodology of political science Auguste Comte, John Stuart Mill, Alexander Bain, and Sir George Cornewall Lewis deserve particular mention.[1] Comte conceived the principal methods for the scientific study of social phenomena to be three in number, namely, observation, experiment, and comparison.[2] Mill recognized four methods: the chemical or experimental, the geometrical or abstract, the physical or concrete deductive, and the historical method, the first two of which he considered to be false methods, the last two, the true ones.[3] Bluntschli considered the true methods of political investigation to be the philosophical and the historical.[4] A recent French writer who has devoted a volume to the subject of methodology in political science recognizes six possible lines of investigation: first, the sociological; second, the comparative; third, the dogmatic; fourth, the juridical; fifth, the method of good sense (*du bon sens*); and, sixth, the historical.[5] Other writers dwell upon what they

[1] Jellinek observes that in the literature of political methodology the greatest confusion reigns. Many of the best writers on the subject, he says, have not been conscious of the difficulties and have not learned how easy it is to fall into error by confounding fantasies and analogies with real truths. "Recht des mod. Staates," p. 24. For an examination of the literature and a discussion of the subject of the methodology of political science, see Jellinek, *op. cit.*, bk. I, ch. 2.

[2] "Positive Philosophy" (tr. by Martineau), vol. II, pp. 79–91. Comte conceived an ultimate fourth method, the historical, to be applied only in the investigation of the most complex social phenomena. Compare also McKenzie, "Introduction to Social Philosophy," p. 14.

[3] "System of Logic," pp. 550–587. [4] "Allgemeine Staatslehre," bk. I, ch. II.

[5] Deslandres, "La Crise de la Science politique et le Problème de la Méthode."

Recognized Methods

are pleased to call the biological and psychological methods. Without considering each of these in turn we may observe that some of them are hardly applicable to the study of political phenomena, while others are nothing more than particular forms of the comparative method — a method so broad as to comprehend the processes of accumulation, arrangement, classification, coördination, elimination, and deduction.

The Method of Experimentation

We may well question the claim of the experimental method to a rightful place in the methodology of political science because, as has already been stated, the nature of society is such that it cannot very well be made an object of artificial experimentation. "We cannot," says Sir George C. Lewis, "treat the body politic as a *corpus vile* and vary its circumstances at our pleasure for the sake only of ascertaining abstract truth. We cannot do in politics what the experimenter does in chemistry. We cannot try how the substance is affected by change of temperature, by burning, by dissolution in liquids, by combination with other chemical agents, and the like. We cannot take a portion of the community in our hands as the king of Brobdignag took Gulliver, view it in different aspects and place it in different positions in order to solve social problems and satisfy our speculative curiosity."[1] If the chemist wishes to study the effect of a combination of certain substances, he can create by artificial processes conditions favorable to the investigation and exclude disturbing agencies. He may isolate the phenomenon with which he deals and expose it to certain selected influences, leaving the surrounding medium unchanged. But if the political scientist wishes to experiment with democracy, for instance, he cannot select a state at will, introduce his democracy and wait for determinate results. He will find himself powerless to exclude extraneous influences, such, for example, as famines, commercial crises, insurrections, or

[1] "Methods of Observation and Reasoning in Politics," vol. I, pp. 164–165.

other happenings which might destroy the results of the experiment.[1]

But while scientific experimentation, as the term is employed in the physical sciences, is inapplicable to the study of politics, practical experiments, the *experimenta fructifera* of Bacon, are being constantly made, consciously or unconsciously. It is true, as Comte points out, that political experimentation really takes place whenever the regular course of state life undergoes conscious or unconscious change.[2] Government, of necessity, is constantly trying experiments on the community.[3] Indeed the whole life of the state is a succession of activities which, in a sense, are experimental in character. The enactment of every new law, the establishment of every new institution, the inauguration of every new policy, is experimental in the sense that it is regarded merely as provisional and tentative until experience has proved its fitness to become permanent. By observing the operation of a new law or a new policy and then enlarging or diminishing its scope as experience suggests modification, the legislature is able to adapt its provisions to the needs and desires of the community. The process is in the nature of an experiment whose purpose is not the ascertainment of a general truth — not *experimenta lucifera* — but experiments for the purpose of testing and improving the institution.

The Sociological and Biological Methods

The so-called sociological method considers the state primarily as a social organism, whose component parts are individuals, and seeks to deduce its qualities and attributes from the qualities and attributes of the men composing it. It seeks to interpret the life of the state by applying to it the theory of evolution in the same way that the growth

[1] Compare Bain, "Deductive and Inductive Logic," p. 563.

[2] "Positive Philosophy," vol. II, p. 83.

[3] Lewis, *op. cit.*, vol. I, p. 173. "If by an experimental science," observes Lewis, "we mean a science which admits of scientific experiments, of *experimenta lucifera*, then politics is not an experimental science; but if we mean a science founded on observation and experience, politics is an experimental science." *Op. cit.*, p. 178.

of the individual is explained by evolution. Closely akin to the sociological method is the biological, which attributes to the state the attributes of a living organism and which attempts to define and classify its separate parts, to describe its structure in the nomenclature of anatomy, and to differentiate and analyze its functions and trace its life processes according to the methods and terminology of the biological sciences. Among those who have made notable contributions to the study of organized society from the sociological and biological points of view may be mentioned Auguste Comte, Herbert Spencer, the Austrian scholars Gumplowicz and Schäffle, and the French writers Durkheim, De Greef, Fouilleé, and Letourneau, and the Russian Lilienfeld. Comte in this study of society dwells at length upon what he calls "social physics" and "social physiology."[1] Spencer, who was deeply infatuated with the biological analogy, drew a striking parallel between the social and animal organisms, pointing out that each possessed a "sustaining system," a "distributing system" and a "regulating and expending system."[2]

The first criticism to be made of the sociological and biological theories is that they are not so much methods of investigation as points of view from which the state may be considered. The biological method rests mainly upon analogy instead of upon real similarity in essentials. It requires but little reflection to see that the resemblance between the body politic and the human organism is at

[1] "Positive Philosophy, ed. of 1868, pp. 487–489. For an identification of sociological and biological laws see an article by M. Novicow, "Annales de l'Inst. de Sociologie," 1897, p. 79. For a discussion of the so-called sociological method see Deslandres, *op. cit.*, p. 53 *et seq.*; Worms, "Revue int. de Sociologie," 1893, p. 12; Gumplowicz, "Sociologie und Politik," also his "Sociologische Staatsidee"; Durkheim, "Les Régles de la Méthode sociologique"; De Greef, "Les Lois sociologiques"; and Fouilleé, "La Science sociale contemporaine," ch. III.

[2] See his "Principles of Sociology," vol. I, chs. 7, 8, and 9. For an ingenious attempt to trace the resemblances between natural science and political science see Gumplowicz, "Allgemeine Staatsrecht," ch. 1.

best only superficial, that the laws of growth and change which govern the one are inapplicable to the growth and development of the other, and that little or nothing is to be gained by dwelling upon the analogy.[1]

The Psychological Method

Essentially the same judgment may be passed upon the so-called psychological[2] method, which in recent years has been overexploited by a certain class of writers, mostly French, who have attempted to explain social phenomena and interpret social institutions through psychological laws.[2]

The Juridical Method

A method of treatment which enjoys great favor among German political writers and to a less degree among the French is the juristic or juridical method.[3] It is the aim of this method, according to Jellinek, to "determine the content of the rules of public law and to deduce therefrom the conclusions to which they lead." It regards political science as a science of legal norms (*Staatsrechtslehre*) having nothing in common with the science of the state as a social organism (*Soziale Staatslehre*). It conceives the relations of the state always as "*öffentliche Verhältnisse*," political concepts as "*Rechtsbegriffe*" and describes the constitution and activities of the state only in terms of their "*rechtliche Natur.*" In short, it treats society, not as a social phenomenon, but as a purely juridical régime, an *ensemble* of public law, rights, and obligations, founded on a system of

[1] See an article by Lilienfeld, entitled "*Y a-t-il une loi de l'évolution des formes politiques?*" in the "Annales de l'Inst. de Sociologie," 1895, pp. 235–246. For a negative view see an article by Starke in the same journal in the year 1896.

[2] For a defense of the psychological method in the study of the social sciences see an article by M. Beudant, in the "Revue du Droit public," 1896, vol. V, pp. 434–456. Beudant's views are criticised by M. Worms (*ibid.*, vol. VI, pp. 66–70) and the latter's reply is in turn answered by Beudant (*ibid.*, pp. 469–475). See also Le Bon, "Lois psychologiques de l'Évolution des Peuples"; Baldwin, "Psychology of Social Organization" in the "Psychological Review," vol. XIV, p. 482; Ward, "Psychic Factors of Civilization," p. 299; Tarde, "Lois de l'Imitation," especially ch. 2.

[3] See Georg Meyer, "The Development of Political Science in the German Universities" in Lexis, "Die deutschen Universitäten," vol. I; also Jellinek, "Recht des mod. Staates," bk. I, ch. 2, tit. 6 (Die juristische Methode in der Staatslehre).

pure logic and reason.[1] The state as an organism of growth and development, however, cannot be understood without a consideration of those extra-legal and social forces which lie back of the constitution and which are responsible for many of its actions and reciprocal reactions. Any view, therefore, which conceives the state merely as an institution of public law is as narrow and fruitless as the Hegelian doctrine which goes to the opposite extreme and considers it merely as a moral entity.[2]

The Comparative Method

The comparative method, first employed by Aristotle, later by Montesquieu and still more recently by De Tocqueville, Laboulaye, Bryce, and others, aims through the study of existing polities or those which have existed in the past to assemble a definite body of material from which the investigator by selection, comparison, and elimination may discover the ideal types and progressive forces of political history. Only those states which are contemporaneous in point of time, as Jellinek remarks, and which have a common historical basis (*Boden*) and common historical political and social institutions may be compared with advantage. The comparative method, observes M. Saleilles, a noted French publicist, discovers the "general current" which runs through the whole body of constitutions and upon which experience has set the stamp of approval. "*Ce courant général*," he declares, "*on le découvre par l'étude*

[1] "Recht des mod. Staates," p. 49. For more detailed studies of the juridical method see Jellinek, "System der subjektiven öffentlichen Rechte," p. 21 *et seq.*, and Deslandres, *op. cit.* See also Michoud, "Théorie de la Personnalité morale." An excellent example of the use of the juridical method is found in Laband's brilliant study of the German Empire, "Staatsrecht des deutschen Reiches." This method, as Laband states it in the preface to his treatise, is that of "analysis of public law relations, the establishment of the juristic nature of the state, the discovery of general superior juridical principles and the deduction therefrom of conclusions." For a juristic conception of the nature of the state see his statement regarding the nature of the German Empire in the preface to his work.

[2] For a criticism of the juridical method see Deslandres, *op. cit.*, pp. 108, 115. For a defense of it see Combothecra, "La Conception juridique de l'État," and Saripolos, "La Démocratie et l'Élection Proportionnelle."

critique de chacune des législations étrangères envisagées au point de vue économique et social, le recherche des points de contact susceptibles de correspondre à un courant d'évolution commun à plusieurs pays, la détermination d'un ou de plusieurs types juridiques vers lesquels doive s'orienter la politique juridique des différents pays à état social sensiblement similaire." [1] The danger of the comparative method lies in the liability to error to which it is susceptible in practice, since, in the effort to discover general principles, the diversity of conditions, due to different circumstances, such as the temperament and genius of the people, economic and social conditions, moral and legal standards, political training and experience, are apt to be ignored or overlooked.

J. S. Mill has undertaken to show that the comparative method may assume several forms, the "most perfect" of which is the process of *difference* by which two polities identical in every particular except one are compared with a view to discovering the effect of the differing factor. Thus two states are compared which are similar as regards their natural wealth, legal systems, racial conditions, etc., but one of which maintains a restrictive trade system. If, therefore, one is found to be prosperous and the other not, a general conclusion is postulated with regard to the effect of restrictive commercial policies upon the national prosperity. The method of *indirect difference* compares two classes of "instances" which agree in nothing but the presence of a factor on the one side and its absence on the other. Thus one state which maintains a protective system may be compared with two or more states which have nothing in common but a free trade policy. By the method of *agreement* two polities wholly different with the exception of two common factors may be compared. Thus two states agreeing in no particular except in having a restrictive trade system and in being prosperous are compared with a view

[1] "Conception et Objet de la Science du Droit comparé," in "Le Bulletin de la Société législative compareé" for 1900.

to establishing a connection between the restrictive policy and the prosperity. Like the method of difference, it is inadequate because its results are likely to be affected by extraneous circumstances, or, as Bain says, by a "plurality of causes with an intermixture of effects." [1]

The Historical Method

What is really a particular form of the comparative method is the historical method, for the facts relating to past polities have little value for political science until they have been subjected to the several processes of treatment which, as stated above, may be comprehended under the general term "comparison." It is almost a commonplace to-day to affirm the necessity of historical study as a basis for the scientific investigation of political institutions which have historical backgrounds. They can be fully comprehended only through a knowledge of their past; how they have developed, how they have become what they are and to what extent they have responded to the purposes for which they were originally destined.[2] The maxim that constitutions grow instead of being made would have no meaning apart from this truth. The historical method, says Sir Frederick Pollock, "seeks an explanation of what institutions are and are tending to be, more in the knowledge of what they have been and how they came to be what they are, than in the analysis of them as they stand." [3] It brings in review the great political movements of the past, traces the organic development of the national life, inquires into the growth of political ideas from their inception to their realization in objective institutions, discovers the moral idea as revealed in history and thereby points out the way of progress.[4] M. Deslandres,

[1] "Deductive and Inductive Logic," p. 565. Sidgwick is an ardent believer in the comparative method. "Political science," he says, "aims at bringing together for comparison societies similar in their political characteristics, however widely separated in time." "Development of European Polity," p. 3.

[2] For a discussion of the nature and value of the historical method, see Jellinek, *op. cit.*, ch. 2, tit. 5.

[3] "History of the Science of Politics," p. 11.

[4] Compare Bluntschli, "Allgemeine Staatslehre," bk. I, ch. 2.

in his work, "La Crise de la Science politique et le Probléme de la Méthode," concludes his study of the whole problem of methodology with the following estimate of the historical method: "*Puis, si j'ai fait appel à plusieurs disciplines pour constituer la méthode de la science politique, j'ai mis tant au premier rang l'histoire. Ce sont donc des études d'histoire constitutionnelle, que j'appelle de tous mes vœux, et vers lesquelles je voudrais orienter ceux qui comprennent que la science politique est faite pour la vie. Car l'histoire, c'est la science de la vie et c'est l'élément solide, sans laquelle la science politique ne peut etre que fragile et hasardeuse.*" [1]

What Professor Seeley calls the "irresistible temptation to mix up what ought to be with what is" finds an illustration in the ideas of Sidgwick and Pollock (which were also the ideas of Plato and Aristotle), according to which the main object of political science is the discovery of the perfect or ideal state. To realize this purpose, political science must first proceed to inquire what is the end of the state, and having satisfactorily answered this question, must ascertain what institutions and laws are best adapted for the attainment of this end. Seeley criticises this method as un-

[1] p. 256. A less favorable opinion of the historical method is held by Sidgwick, who maintains that the primary aim of political science is to determine what *ought to be* so far as the constitution and action of government are concerned and that this end cannot be discovered by a historical study of the forms and functions of government. "I do not think," he says, "that this historical method is the one to be primarily used in attempting to find reasoned solutions of the problems of practical politics." Sidgwick, however, concedes that the historical method has a place in the science of the state. "By means of it," he says, "we can ascertain the laws of practical evolution and thus forecast, though dimly, the future. From it we may obtain some notion of the limits within which any practicable ideal is confined and the kind of society and circumstances for which the political institutions of the future will have to be adapted." "Lastly," he says, "we may learn, partially at least, which of the elements and characteristics of our own political society are likely to increase and become more important as time passes and which are likely to decrease and become less important." "Development of European Polity," p. 5; also "Elements of Politics," pp. 7–14. Cf. also Montague, "Limits of Individual Liberty," p. 83, who says, "The true method is the historical. . . . History alone can supply the material for a science of society."

natural and fruitless. Instead of beginning with an inquiry into the purpose of the state and the characteristics of the best state, he would proceed, first, with classifying the states which he wished to study; second, with analyzing the structure of a particular state and distinguishing the functions of its several organs; third, with tracing its growth and development, noting any abnormal conditions in its life history; and, fourth, with philosophizing upon the nature of the state in general. The vast mass of facts collected by different observers must be subjected to rigid scientific tests. "We must," he says, "think, reason, generalize, define, and distinguish; we must also collect, authenticate, and investigate. If we neglect the first process, we shall accumulate facts to little purpose, because we shall have no test by which to distinguish facts which are important from those which are unimportant; and, of course, if we neglect the second process, our reasonings will be baseless and we shall but weave scholastic cobwebs." [1]

V. RELATION OF POLITICAL SCIENCE TO OTHER SCIENCES [2]

The "Allies" of Political Science

Political science is not the only science which deals with men in organized society, for, as we have seen, the state manifests itself under the forms of a social as well as a political organism and indeed is not without a psychical and a physical element. Although an autonomous science in the sense that it is not a mere discipline of some other science, it does not stand entirely unrelated to other sciences any more than the state stands isolated in the universe of phenomena. We can no more understand political science, as the science of the totality of state

[1] "Introduction to Political Science," p. 19.

[2] For a more detailed consideration of this subject than is given in the present chapter see two articles by the writer entitled "The Relations of Political Science," in the "American Journal of Sociology" for November, 1906; and "The Relation of Political Science and Ethics," in the "International Journal of Ethics" for January, 1907.

phenomena, without a knowledge of the allied sciences or disciplines, than we can comprehend biology without chemistry, or mechanics without mathematics.[1] Paul Janet, a noted French writer, has well said that political science is "closely connected with political economy or the science of wealth; with law, either natural or positive, which occupies itself principally with the relations of citizens one to another; with history, which furnishes the facts of which it has need; with philosophy, and especially with morals, which gives to it a part of its principles." [2] Other writers, like Jellinek, have treated geography, physical anthropology, ethnology, psychology, and ethics as among the studies auxiliary to political science.[3] Formerly there was a disposition to exaggerate and emphasize to their common detriment the independence of each branch of knowledge, but the tendency of modern thought is to accentuate the relations instead of the differences. In this connection Sidgwick has aptly remarked that it is for the good of any department of knowledge or inquiry to understand as thoroughly as possible its relation to other sciences and to see clearly what elements of its reasonings it has to take from them and what in its turn it may claim to give them.[4]

Relation to Sociology

First of all, political science touches at many points sociology, which may be described as the fundamental social science. As has been well said, the political is embedded in the social, and if political science remains distinct from sociology, it will be because the breadth of the field calls for the specialist, and not because there are any well-

[1] Compare the views of Jellinek on this point; "Recht des mod. Staates," bk. I, ch. 4, tit. I; also Von Mohl, "Geschichte und Litteratur der Staatswissenschaften," vol. I, p. 1; and Zacharia, "Vierzig Bücher vom Staate," vol. I, bks. 7–8, where the relation between political science, mechanics, statistics, and chemistry is discussed at length.

[2] Art. "Politique," in Block's "Dictionnaire de la Politique," vol. II, p. 576.

[3] *Op. cit.*, pp. 72–120.

[4] "Relation of Ethics to Sociology," "Int. Jour. of Ethics," vol. X, p. 8.

defined boundaries marking it off from sociology.[1] While, however, the two sciences touch at many points, so that there are no natural boundaries between them, their spheres have been pretty definitely differentiated for purposes of scientific investigation. It is well, therefore, to recognize that the domains and the problems of the two sciences are by no means the same.

The Respective Domains of Sociology and Political Science

In general, we may say that sociology is concerned with the scientific study of society viewed as an aggregate of individuals (the social aggregate) or, as has been said, it is the "science of men in their associated processes";[2] while political science deals with the political aspects of a particular portion of society viewed as an organized unit. Political science is concerned with one form only of human association, namely, the political; it has, therefore, a narrower and more restricted field, and begins much later with the life of the race than does sociology. In sociology the unit of investigation is the *socius*, that is, the individual viewed not merely as an animal and a conscious being, but also as a neighbor, a citizen, a coworker, in short, a social creature.[3] In political science the unit of study is the state as distinct from the nation, the tribe, the clan, the family, or the individual, though not unconnected with them; that is, its primary subject is a definite portion of society which manifests, in a comparatively high degree, a political self-consciousness and which has become organized politically.

[1] Ross, "Foundations of Sociology," p. 22. For an illuminating discussion of the relations of sociology with other sciences, particularly with politics and economics, see Small, "American Journal of Sociology," July, 1906, pp. 11–31.

[2] Small, "General Sociology," p. 7.

[3] Compare Giddings, "Elements of Sociology," p. 11; Small, "American Journal of Sociology," January, 1900; Ward, "Popular Science Monthly" June, 1902. Gumplowicz, an Austrian economist and sociologist, maintains that the group instead of the individual is the unit of sociological investigation. He has worked out an interesting sociological theory of the state which considers social groups instead of "free and equal" individuals the constituent elements of the state. See his "Die soziologische Staatsidee," p. 52; also his "Sociologie und Politik," pp. 53–58.

Relation to History

In the second place, political science is closely related to history. It is, as Jellinek remarks, almost a commonplace to-day to affirm the necessity of historical study as a basis for a proper understanding of institutions, whether they be political, legal, or social.[1] The political scientist should study, not only the nature of political institutions, but how they have developed and to what extent they have fulfilled the purposes of their existence. History furnishes us in a great measure the materials for comparison and induction. This is especially true of political history, which concerns itself with the formation of states, their growth, and their decline. The relationship was tersely expressed by the late Professor Seeley, who said "political science without history is hollow and baseless; or to put it in rhyme: history without political science has no fruit; and political science without history has no root."[2]

Problem of Political Science

While history furnishes much of the data for political science it is not true, as Freeman once declared, that history is past politics or that politics is present history. Not all of history is "past politics." Much of it — like the history of art, of science, of inventions, discoveries, military campaigns, language, customs, dress, industries, religious controversies — has little, if any, relation to politics and affords no material for political investigation.[3] On the other hand, not all political science is history. Much of it is of a purely philosophical and speculative

[1] "Recht des mod. Staates," p. 41. "*Die beschreibende Grundlage aller Socialwissenschaft, auch der Staatswissenschaft, ist die Geschichte, welche die sociale Thatsachen in ihrem historischen Verlaufe fest- und darstellt sowie deren äussere und innere Verknüpfung nachweist.*" *Op. cit.*, p. 8.

[2] "Introduction to Political Science," p. 4. Compare the following from Lord Acton: "The science of politics is the one science that is deposited by the stream of history like the grains of gold in the sands of a river;" also "the student of history is a politician with his face turned backward."

[3] We have, as Professor Small observes, "histories of everything from civilization to coinage — histories of church doctrine, military tactics, language, painting, prostitution, and even of the devil" ("American Journal of Sociology," July, 1906, p. 18). It would, of course, be preposterous to assert that such "history" is "past politics."

character, and cannot therefore be assigned to the category of history. The function of history is to narrate and interpret a succession of events; to discover how institutions have persisted and changed from generation to generation; to trace tendencies and laws of growth. It is not restricted in its sphere to those parts of society which manifest political consciousness and which have received political organization, but deals with the record of man prior to as well as subsequent to the organization of the state. The function of political science, historically considered, is to explain political institutions, and it is concerned only with that part of history which is capable of throwing light upon their present character. According to certain writers, its principal problem is the teleological one of determining what *ought to be*, so far as the constitution and functions of government are concerned, while history is concerned with what *has been*.[1] Thus, although their problems are distinct, they have a common subject in the phenomena of the state, and therefore their spheres touch at many points and overlap at others. To fully comprehend political science in its fundamental relations we must study it historically, and to interpret history in its true significance we must study that politically. As studies they are therefore mutually contributory and supplementary. "Politics are vulgar," said Professor Seeley, "when not liberalized by history, and history fades into mere literature when it loses sight of its relation to politics."[2] Separate them, says Burgess, and the one becomes a cripple, if not a corpse, the other a will-of-the-wisp.[3] Seeley conceived history to be the name of the residuum which is left when one group of facts after another has been taken

[1] Sidgwick, "Elements of Politics," p. 7; also "Development of European Polity," p. 5.

[2] "Introduction to Political Science," p. 4.

[3] "Relation of History to Political Science," Annual Report American Historical Association, 1896, vol. I, p. 211.

possession of by some science. Ultimately, he says, a science will take possession of the residuum, and this science will be political science. Many of the facts of history, he points out, are no longer recorded in historical treatises, but have been appropriated by other sciences. Thus the facts of the past relating to meteorology, biology, hygiene, surgery, and various other sciences and arts are not recorded in historical, but in scientific treatises. Physiology has taken possession of a definite group of historical facts; pathology, of another; political economy is appropriating the facts of industry; jurisprudence, of law; etc. If this process of appropriation continues, all the facts of history in the end will be swallowed up.[1] Already historians deal meagerly with the facts regarding the phenomena of the sciences and arts, contenting themselves with referring the reader to some special treatise for information.

Relation to Political Economy

With *political economy*, —or *economics*, to use the more modern term, — political science is closely related; indeed, it is classed as a branch of political science by at least one noted economist.[2] It was first called "political" economy by the Greeks, and was defined by them as the art of providing revenue for the state.[3] Senior remarks that as late as the eighteenth century political economy was regarded as a branch of statesmanship particularly by the physiocrats, and that those who assumed the name of political economists avowedly treated, not of wealth, but of government.[4] His own conception of the scope of political economy was affected by this view, and he laid it down as a principle that this science involved a "consideration of the whole theory of morals, of government, and of civil and criminal legislation."

[1] *Op. cit.*, p. 12.

[2] Dugald Stewart, "Lectures on Political Economy," vol. I, p. 24.

[3] Seligman, "Principles of Economics," p. 7; Hadley, "Relation between Politics and Economics," Publications of the American Economic Association, 1899.

[4] "Political Economy," p. 1.

The first systematic English writer on the subject, Sir James Stewart, in his "Inquiry into the Principles of Political Economy" (published in 1767), enunciated this view when he said: "What economy is in the family, political economy is in the state. . . . The great art, therefore, of political economy is first to adapt the different operations of it to the spirit, manners, habits, and customs of the people, and afterward to model these circumstances so as to be able to introduce a set of new and more useful institutions."[1] Nine years later, Adam Smith published his "Inquiry into the Nature and Causes of the Wealth of Nations," in which he stated the objects of political economy, "considered as a branch of the science of a statesman," to be two: first, to provide adequate "revenue or substance for the people or, more properly, to enable them to provide it for themselves"; and, second, to supply the state or commonwealth "with a revenue sufficient for the public service." "It proposes," he said, "to enrich both the people and the sovereign."[2]

Interaction of Politics and Economics

Without quoting further from the earlier writers, it is clear that they conceived economics to be a branch of the general science of the state. Writers of the present day no longer hold to the earlier conception, yet there is no difference of opinion among them concerning the existence of a close relationship of economics and politics as ancillary social sciences. Political and social life is obviously intermixed with, and the activities and even the forms of government are profoundly influenced by, economic conditions. Conversely, there is a distinct interaction of politics upon economics. The production and distribution of

[1] Works, vol. I, pp. 2, 3.

[2] Book IV, Introduction. It may not be out of place to mention that Smith, as a professor at Glasgow (1751–64), lectured on natural theology, ethical philosophy, jurisprudence, and political economy, indicating that these subjects were considered to be not only related, but actually complementary to each other. Compare Mill, "Political Economy," vol. I, p. 3; and Sidgwick, "The Principles of Political Economy," pp. 14–16.

wealth are to some extent determined by the existing forms of government.[1] The solution of many economic problems must come through political channels, while, on the other hand, some of the fundamental problems of the state have their origin in economic considerations. Thus tariff laws and trade restrictive acts, generally, are favored or opposed largely on economic grounds and to a great extent the whole question of the relation between government and liberty is at bottom an economic problem. The burning questions of present-day politics: government control of public utilities, the relation of the state to corporate enterprise, and its attitude toward the whole question of capital and labor, are at the same time fundamentally questions of economics; indeed, the whole theory of government administration is largely economic.

[1] It is no doubt true, says Nicholson, that the system of government "operates on economic facts," and that "economic history furnishes endless examples of the injurious effects of bad government." "Principles of Political Economy," p. 13.

CHAPTER II

THE NATURE OF THE STATE

Suggested Readings: BLUNTSCHLI, "Allgemeine Staatslehre," bk. I, ch. 1; bk. II, chs. 2–4; also his "Psychologische Studien über Staat und Kirche," pp. 1–87; BORNHAK, "Allgemeine Staatslehre," pp. 8–15; BURGESS, "Political Science and Constitutional Law," vol. I, chs. 1–4; bk. II, ch. 1; CARNAZZA-AMARI, "Traité de Droit international public," vol. I, pt. I, chs. 1 and 2; DUGUIT, "Droit constitutionnel," secs. 8–13; 20–22; also his "L'État, Les Gouvernants et Les Agents," ch. 1; FOUILLÉE, "La Science sociale contemporaine," chs. 2 and 3; FUNCK-BRENTANO, "La Politique," ch. 2; GUMPLOWICZ, "Allgemeines Staatsrecht," bk. I, chs. 1 and 4; HELD, "Staatsrecht," ch. I; also his "System des Verfassungsrechts," ch. 6; HOLLAND, "Elements of Jurisprudence," ch. 4; JELLINEK, "Recht des modernen Staates," bk. II, ch. 6; also his "System der subjektiven öffentlichen Rechte," pp. 12–41; LEACOCK, "Elements of Political Science," ch. 1; LECKY, "Democracy and Liberty," vol. I, ch. 5; LEROY-BEAULIEU, "The Modern State," chs. 1–5; MCKECHNIE, "The State and the Individual," pt. I, ch. 1; MACKENZIE, "Introduction to Social Philosophy," ch. 3; MERIGNHAC, "Traité de Droit int. pub.," vol. I, pp. 117–154; MEYER, "Deutsches Staatsrecht," secs. 2 and 3; MULFORD, "The Nation," ch. 1; POSADO, "Tratado de Derecho Politico," vol. I, ch. 1; REHM, "Allgemeine Staatslehre" in MARQUARDSEN, Einleitungsband II, secs. 3–5; ROUSSEAU, "Contrat social," bk. III, ch. 10; BRUNO SCHMIDT, "Der Staat"; RICHARD SCHMIDT, "Allgemeine Staatslehre," vol. I, sec. 25; SCHULZE, "Deutsches Staatsrecht," vol. I, ch. 1; SEELEY, "Introduction to Political Science," lects. I and II; SEYDEL, "Grundzüge einer allgemeine Staatslehre," pp. 1–18; SPENCER, "Principles of Sociology," vol. I, pt. II, chs. 3, 4, 7–9; TREITSCHKE, "Politik," vol. I, sec. I; WAITZ, "Grundzüge der Politik," pp. 1–20; WILLOUGHBY, "The Nature of the State," chs. 1 and 2; WOOLSEY, "Political Science," vol. I, pt. II, chs. 1 and 2; WORMS, "Organisme et Société," pts. II and III.

I. DEFINITIONS AND DISTINCTIONS

DEFINITIONS of the state, as the German writer Schulze has remarked, are innumerable, almost every author having his own, and scarcely any two being alike.[1]

[1] "Deutsches Staatsrecht," vol. I, p. 15.

Definitions of the State

The English writer Holland defines a state as a "numerous assemblage of human beings, generally occupying a certain territory, among whom the will of the majority or of an ascertainable class of persons is by the strength of such a majority or class made to prevail against any of their number who oppose it." [1] Hall, viewing the state primarily as a concept of international law, says, "The marks of an independent state are that the community constituting it is permanently established for a political end, that it possesses a defined territory and that it is independent of external control." [2]

The German writer Seydel says, "A state comes into existence whenever a number of men who have taken possession of a part of the earth's surface unite themselves together under a higher will." [3] Grotius defined the state (*civitas*) as a "perfect society of free men united for the sake of enjoying the advantages of right and the common utility." [4] Vattel, in almost the same language, defined it as a "body politic or society of men who seek their well-being and common advantage in the combination of their forces." [5] Burgess defines the state as a "particular portion of mankind viewed as an organized unit," [6] which is substantially the same as the definition given by Bluntschli, who says, "The state is the politically organized people of a definite territory." [7] The United States Supreme

[1] "Elements of Jurisprudence" (6th ed.), p. 40.

[2] "International Law" (3d ed.), p. 18.

[3] "Grundzüge einer allgemeine Staatslehre," p. 1; see also p. 4.

[4] "De Jure Belli et Pacis," bk. I, ch. 1, sec. 13 (Whewell's ed., p. 18).

[5] "Droit des Gens," vol. I, sec. 1. Wheaton defines the state in substantially the same words, "Elements of the Law of Nations," ch. 2, sec. 2. Grotius's, Vattel's, and Wheaton's definitions are drawn from Cicero's definition of the *respublica* as a "numerous society united by a common sense of right and a mutual participation in advantages," "De Republica," bk. I, 25. For a criticism of Cicero's definition, see Calvo, "Droit int. théorique et pratique," vol. I, p. 168, and Pradier-Fodéré, "Traité de Droit int. pub.," vol. I, p. 146.

[6] "Political Science and Constitutional Law," vol. I, p. 50.

[7] "Allgemeine Staatslehre," vol. I, p. 24; also his "Psychologische Studien," p. 22.

Court in an early case defined a state as "a body of free persons united together for the common benefit, to enjoy peaceably what is their own and to do justice to others." [1]

Phillimore says a state for all purposes of international law is "a people permanently occupying a fixed territory, bound together by common laws, habits, and customs into one body politic, exercising through the medium of an organized government independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace and of entering into all international relations with the communities of the globe." [2] Other writers have emphasized the spiritual and moral nature of the state to the neglect of its other aspects. Thus Hegel defined it as "the incorporation of the objective spirit" (*die Verkörperung des objektiven Geistes*); while Pufendorf conceived it to be simply "a moral person endowed with a collective will." Such definitions are manifestly based on a one-sided view of the state and consequently bring out but one of its many characteristics.[3]

[1] Chisholm *v.* Ga., 2 Dall. 456.

[2] "International Law" (3d ed.), vol. I, p. 81.

[3] Other definitions are the following: "The state is the mastery over land and people which are independent of every earthly power," Bornhak, "Allgemeine Staatslehre," p. 9; "The state is the bodily form of the spiritual community of the nation," Savigny, "System des römischen Rechts," vol. I, p. 22; "A state is an aggregation of families and their common possessions ruled by a sovereign power according to reason," Bodin, "De Republica," bk. 6; "When a people possessing a fixed home unite themselves under a common and supreme legislative, executive, and judicial power which fixes and guarantees their rights, they form a state," G. F. de Martens, "Précis du Droit des Gens," vol. I, sec. 3; "A state is a certain number of men and of families who, being united and having a fixed home, associate themselves and submit themselves to a common chief with the intention of living together for the safety of all," Kluber, "Droit des Gens," sec. 20; "The state is a permanent association of men united and governed by a common will for the purpose of providing for their common physical and moral necessities," Heffter, "Droit int. de l'Europe," sec. 15; "The state is a permanent unitary organism whose arrangements, directed by a collective will as well as supported and executed by common strength, has for its problem the promotion of the life purposes of a definite population," Von Mohl, "Encyklopädie der Staatswissenschaften," p. 71; "The state is a group of men more

If one more definition may be added to the long list already given, I would offer the following: The state, as a concept of political science and constitutional law, is a community of persons more or less numerous, permanently occupying a definite portion of territory, independent of external control and possessing an organized government to which the great body of inhabitants render habitual obedience. The essential constituent elements, political, physical, and spiritual, of the modern state are all brought out in this definition. They are: first, a group of persons acting together for common purposes; second, the occupation of a determinate portion of the earth's surface which constitutes the home (or, as the Germans say, the *Boden*) of the population; third, independence of foreign control; and fourth, a common supreme authority or agency through which the collective will is expressed and enforced.[1]

or less numerous, united under common institutions and under the same sovereign," Laveleye, "Le Gouvernement dans la Démocratie," vol. I. p. 19; "A state is an independent community organized in a permanent manner in a definite territory," Rivier, "Principes du Droit des Gens," vol. I, p. 45; "The state is the union of a living people in a collective personality (*gesamte Persönlichkeit*) under a supreme power and a definite constitution for the realization of all common purposes, especially the establishment of the legal order (*Herrstellung des Rechtsordnung*)," Schulze, "Deutsches Staatsrecht," vol. I, p. 19. For a somewhat similar definition, see Jellinek, "Recht des mod. Staates," p. 173.

[1] Compare Hall ("International Law," p. 21), who says, "The simple fact that a community in its collective capacity exercises independent and exclusive control over all persons and things within the territory occupied by it, that it regulates its external conduct independently of the will of any other community and in conformity with the dictates of international law, and finally that it gives reason to expect that its existence will be permanent, are sufficient to render it a person in law." See also Bornhak ("Allgemeine Staatslehre," p. 8), who says "three factors are necessary to the concept of the state: a definite territory, a population attached thereto, and the subjection of both to a supreme magistracy;" also Seydel, "Grundzüge einer allgemeinen Staatslehre," p. 4; Pradier-Fodéré, "Traité de Droit int. pub.," vol. 1, p. 152; Jellinek, *op. cit.*, p. 137; and Carnazza-Amari, "Droit int. pub.," vol. I, p. 196. Willoughby ("Nature of the State," p. 4) enumerates the essential elements of the state as: "first, a community of people socially united; second, a political machinery termed a government and administered by a corps of officials termed a magistracy and, third, a body of rules or maxims, written or unwritten, determining the scope of this public authority and the manner of its exercise." Hauriou enumerates the constituent elements of

Ancient Conceptions of the State

The term by which the ancient Greeks designated the state was *polis* (πόλις), the modern English equivalent of which is "city." They never grasped the idea of the territorial or country state. Their political science was, as has been said in the preceding chapter, the science of city states, for it was with the city that their state life was identified. To the Romans likewise the state was the *civitas* or *respublica*. To them the Roman state was identical with the city of Rome, Italy and the provinces being only dependencies of the mother city. The conception of the state as embracing non-urban land or country territory made its appearance slowly during the Middle Ages. In Germany the coming into use of such terms as *Landtag*, *Landesstaatsrecht* and *Landesgesetz* indicated the new conception of the state as a territorial instead of an urban commonwealth.[1]

The word "state" (*stato*) first appeared in Italian political literature and presently came to be applied, not to the city community alone, but also to the country territory embraced within the jurisdiction of the governing city.[2] In the course of the sixteenth and seventeenth centuries the words *state*, *état*, *Staat*, appeared in English, French, and German literature, though in France Bodin as late as 1576 preferred the term "republic" (*république*) as the subject of his famous treatise.

Various Meanings of the Term "State"

Regarding the meaning of the term "state," we may observe that it has a popular signification and a meaning technical to political science. In the popular sense the term is often used synonymously with "nation," "society,"

the state as (1) population, (2) territory, and (3) a certain degree of civilization or political consciousness including a fair degree of economic development. "Droit administratif," pp. 6–7. According to Rivier the essential elements are (1) territory and population, (2) a collective will and government, (3) independence and permanence. "Principes du Droit des Gens," vol. I, p. 46.

[1] Cf. Jellinek, "Recht des mod. Staates," p. 125.

[2] See Nys, "L'État et la nation de l'État," "Revue de Droit int.," 1901, pp. 420 ff.

"country," "power," "government," etc.[1] Technically it has a more precise and exact meaning which is not indicated by any of the above terms. It is very commonly employed to express the idea of the collective action of society as contradistinguished from individual action, as when we speak of "state" aid to education, "state" intervention in industrial affairs, etc. In states having the federal system of government the term possesses a double signification, being employed to designate the federation as a whole and also the autonomous political communities composing it. A still narrower and obviously incorrect use of the term is its employment to designate non-autonomous provinces of monarchical states as is done in Prussia and Austria. The effect of this somewhat loose dualistic employment of the term to designate both the real state and its subdivisions is to introduce confusion into the terminology of political science, and misconceptions into political thinking.[2] It is unfortunate that neither the English, the German, nor the French language contains a suitable term by which the component members of federal unions may be designated and a different one for describing the larger commonwealth of which they are the constituent parts. Finally, the fact that the state is both a concept of constitutional law and of international law has led to additional ambiguity of usage.

The Distinction between State and Government

In the next place, we must distinguish between the terms "state" and "government" often employed by political writers as if they were identical in meaning. In reality

[1] Rousseau, in his "Le Contrat social" (bk. I, ch. 6), suggests the employment of the term "state" when the commonwealth is conceived as *passive;* the term "sovereign" when it is thought of as *active;* and the term "power" when it is compared with its equals.

[2] Burgess, in his "Political Science and Constitutional Law," dwells upon the confusion and inaccuracy resulting from this dual use of the term "state," and seeks to avoid it himself by designating the individual members of federal unions as "commonwealths" and by restricting the use of the word "state" to the federation as a whole. Cf. also Woolsey, "Political Science," vol. I, p. 141, and Jellinek, *op. cit.*, p. 129.

they represent widely different concepts and upon the recognition of the distinction between them depends the true understanding of some of the most fundamental questions of political science. As has already been remarked, the state is a sovereign community, politically organized for the promotion of common ends and the satisfaction of common needs, while the government is the collective name for the agency, magistracy, or organization, through which the will of the state is formulated, expressed, and realized. The government is an essential element or mark of the state, but it is no more the state itself than the brain of an animal is itself the animal, or the board of directors of a corporation is itself the corporation. In earlier times, it was not uncommon to identify the ruling sovereign with the state and the famous saying attributed to Louis XIV (*L'état, c'est moi*) has often been quoted as an example of such identification. If the government and state were identical, the death of the reigning sovereign or the overthrow of the government would necessarily interrupt, if not destroy, the continuity of the state life.[1] But as a matter of fact changes of governmental organization do not affect the existence of the state. States possess the quality of permanence. Governments, on the contrary, are not immortal; they are constantly undergoing change as a result of revolution, of the extinction of dynasties, or through legal processes, yet the state continues unimpaired and unaffected. Governments are mere "contrivances," to use the language of Professor Seeley, through which the state manifests itself. They possess no sovereignty, no original unlimited authority, but only derivative power delegated by the state through its constitution. To understand clearly, therefore, the nature of each and the relation of one to the other we must avoid identifying them either in thought or treatment.

[1] Compare Jellinek, "Recht des mod. Staates." p. 140.

II. STATE AND NATION; THE PRINCIPLE OF NATIONALITY IN THE ORGANIZATION OF STATES

Distinction between State and Nation

In the next place, the state must be distinguished from the nation. Primarily the state, as has been said, is a legal or political concept, while the nation, if the natural meaning suggested by the etymological derivation of the word (*nasci*, *natio*) be regarded, is a racial or ethnical concept. There is no necessary connection between the two, and the best writers never employ the terms synonymously and without discrimination. In reality a nation is not a portion of society politically organized; that is, it is not a state, but in its perfect form it is a portion of society definitely separated from the rest of the world by natural geographical boundaries, the inhabitants of which have a common racial origin, speak the same language, have a common civilization, common customs and traits of character, and a common literature and traditions. This is, as has been said, the perfect nation, not the actual nation as it exists in the world to-day and which popular usage conceives it to be. Some authorities, however, do not consider all the elements mentioned above as absolutely essential to the existence of a nation. Thus Burgess defines a nation as a population having a common language and literature, a common tradition and history, common customs and a common consciousness of rights and wrongs, inhabiting a territory of a geographic unity.[1] He does not seem to consider common descent or identity of race as an essential element but regards community of speech and geographic unity as the principal distinguishing marks. The French publicist, Pradier-Fodéré, defines a nation as "the union of a society of inhabitants of the same country, speaking the same language, governed by the same laws, connected by identity of origin, physical characteristics, and moral dispositions, by community of interests and sentiments and by a fusion of existences acquired by the

The Marks of a Nation

[1] "Political Science and Constitutional Law," vol. I, p. 2.

lapse of centuries." [1] Again he says, "Affinity of race, community of language, of habits, of customs and religion, are the elements which constitute the nation." [2] Calvo, in his work on "International Law," holds substantially the same opinion, emphasizing the fact that the idea of the nation is associated with origin or birth, community of race, community of language, etc.[3] Community of race and language are undoubtedly the most usual and satisfactory tests for determining the existence of a nation.[4] Identity of race implies kinship, while community of language supplies the medium through which the people understand one

[1] "Traité de Droit int. pub.," vol. I, p. 125. See also his "Principes généraux de Droit de Politique et de Législation," p. 184 ff. Compare the definition of Carnazza-Amari, *op. cit.*, vol. I, p. 223: "A nation is a multitude of conational families spontaneously united under a free government and having fixed their abode on a determinate territory with the purpose of obtaining external respect for their personality." A state, he maintains, is an association resting upon force or arbitrary action, while a nation is a state constituted according to nature, not in an artificial or violent manner; that is, an association of families having homogeneous interests and aspirations and constituting a national family.

[2] *Ibid.*, p. 126.

[3] "Droit internat. théorique et pratique," vol. I, p. 169. A distinction, says Bluntschli, is sometimes made between nation and people. A nation, he says, is a "union of masses of men of different occupations and social strata in a hereditary society of common spirit, feeling, and race, bound together especially by language and customs, in a common civilization, which gives them a sense of unity and distinction from all foreigners, quite apart from the bond of the state." A "people" (*Volk*) he conceives to be "a society of all the members of a state united and organized in the state" ("Allgemeine Staatslehre," bk. II, ch. 2). In short, the distinction consists in the existence of political unity in the latter and its absence in the former. Gumplowicz ("Allgemeines Staatsrecht," ed. 1907, pp. 107–110) concurs with Bluntschli in attributing political unity to the "people," that is, in holding that there can be no "people" without a state.

[4] Lecky, however, does not consider race a good test of the existence of a nation, especially when color is the test of the race, since color is an "obscure and deceptive guide." Often race elements, he points out, are so inextricably mixed that it is impossible to separate them. Language and religion he considers a "deeper power" in determining national unities, yet he admits that there are many examples of different creeds and languages successfully blended into one nationality. "Democracy and Liberty," vol. I, p. 5. For good discussions of this subject see Carnazza-Amari, "Droit int. pub.," vol. I, pt. I, ch. 2; Fiore, "Droit int. pub.," vol. I, pt. I, ch. 1; Mancini, "De la Nationalité comme fondement du Droit des Gens," and Nys, "Droit international," vol. I, sec. 2, ch. 2.

another and become friends rather than strangers. Community of language is also a powerful instrument of intellectual and social intercourse and opens the way for the development of a common political consciousness. Gumplowicz, a noted European publicist, however, considers the test of a nation to be simply "community of civilization" (*Kulturgemeinschaft*) which expresses itself in a common language. Identity of speech and similarity of civilization, he declares, are the outgrowth of a common historic past rather than the result of a common ethnic origin. The ethnic origins of many modern nations, as he shows, are diverse and unknown and hence cannot be an infallible test. Thus the German, Italian, Spanish, and French "nationalities" were developed, not from a common stem, but from heterogeneous race elements. Yet each ultimately developed a common language and a common civilization, and these, rather than identity of race origin, are really the distinguishing marks of the nation in each case.[1] Community of religion was once considered an essential mark of the existence of a nation, but with the rise of religious freedom the influence of religion as a bond of national unity has largely disappeared.[2]

Non-identity of State and Nation

As has been stated above, the state and the nation are rarely identical; in earlier times they were less frequently so than now. A single state may in fact embrace within its limits several nations or nationalities.[3] Thus

[1] "Allgemeines Staatsrecht," p. 111 ff.

[2] Pradier-Fodéré, however, as we have seen in his definition above, considers community of religion as one of the constituent elements of the nation. So does Carnazza-Amari, *op. cit.*, vol. I, p. 236.

[3] The distinction between a "nation" and a "nationality" is not always easy to make. In general, we may say that a nation is a population of the same race and language, inhabiting the same territory and constituting the larger part of its population; while a nationality is usually one of several distinct ethnic groups scattered over the state and constituting but a comparatively small part of its whole population (cf. Burgess, *op. cit.*, vol. I, p. 5; and Gumplowicz, "Allgemeines Staatsrecht," p. 124). Thus the English population in the United Kingdom constitutes a nation, while the Celtic element constitutes only a nationality. In the same way we may say that the

the English state embraces within its geographical boundaries at least one nation and various nationalities, notably the Celts of Ireland, the French of lower Canada, the Dutch of South Africa, and others. The kingdom of Hungary includes Slav, Roumanian, Teutonic, and other nationalities. The Belgian state embraces in addition to its dominant French population a considerable Flemish element. Russia contains within its vast boundaries many diverse race elements: Slavs, Lithuanians, Finns, Tartars, Roumans, and others. Switzerland embraces parts of three nations: French, Germans, and Italians. The United States contains in addition to its Teutonic and African populations other important race elements such as the Germans, Scandinavians, Italians, and Irish, though none of these are sufficiently numerous, compact, or isolated, geographically, to constitute distinct ethnic unities.

On the other hand, the limits of the state may be narrower than those of the nation, and hence several states or parts of states may be embraced within the same ethnic unity. Thus the French republic and the greater part of the kingdom of Belgium are embraced within the limits of the same nation. The greater part of the German Empire and parts of the Austrian and Swiss states are embraced within the Germanic nation, while the population of Central and South America is largely the same in ethnic origin and language, yet is spread over many states.

It is evident, therefore, that not every state is a nation nor every nation a state; one is sometimes broader, some-

negro population in the United States, the French population in Canada, the Polish element in the German Empire, constitute nationalities rather than nations. Laveleye, in his "Gouvernement dans la Démocratie" (bk. II, ch. 3), distinguishes between a nation and a nationality as follows: "A nation is a group of men united under the same sovereignty," while "a nationality is a group of men united by identity of origin, race, language, or by community of traditions, history, and interests." A nation, he says, may embrace several nationalities, Austria, for example. But evidently he identifies nation and state by attributing political unity and sovereignty to the nation, while his conception of a nationality is identical with what we have defined as the nation. Cf. also Pradier-Fodéré, "Traité," etc., vol. I, pp. 125–130.

times narrower, in area, than the other, and hence there is frequent overlapping. The tendency of the last century has been in the direction of identification, that is, toward the organization of states with boundary lines coincident in a general way with those of nations. This tendency rests on the great principle of nationality, which seeks to bring those populations having the same ethnic origin and language under the same political organization so as to constitute a single body politic.[1] The principle does not, however, mean that every nation, however small, has an inherent right and a duty to organize itself into a state, for obviously not every nation possesses the requisite population or the political capacity for creating and maintaining a state organization. It is generally agreed, for example, that the Celtic peoples of western Europe, as well as various nationalities in southeastern Europe, together with certain peoples of Asia, have not given evidence of sufficient political capacity to organize and maintain states. Politically weak and incapable peoples everywhere must submit to the guidance and tutelage of the stronger and more highly endowed nations, politically speaking; and some writers go to the length of maintaining that it is the duty of the latter, in the interest of the civilization of the world, to force state organization upon backward races by such means as in their judgment may be necessary to accomplish the result, even to the extent of clearing their territories of their presence and of making it the abode of civilized man.[2]

The Principle of Nationality in the Organization of States

Considerations of national unity and political stability require that, so far as possible, the principle of nationality should be respected in the organization or reorganization of states; and the experience of the last century teaches that wherever it has been disregarded, as it was, for example, by the Congress of Vienna in 1815, when territories and

[1] Compare Laveleye, "Gouvernement dans la Démocratie," bk. II, ch. 3.

[2] Compare Burgess, *op. cit.*, vol. I, p. 46; Bluntschli, *op. cit.*, bk. II, ch. 4.

peoples were divided among the victorious powers without regard to race, nationality, religion, or antecedents, the results have been disastrous and readjustments have become inevitable in the course of time. Wherever geographic and ethnic lines coincide, there is a strong impulse to political organization within these limits — that is, the nation tends to organize itself into a state. During the Middle Ages the principle of nationality played little part in the organization of states, and indeed it did not come to be fully accepted until comparatively recent times. During the nineteenth century it exerted a powerful influence upon the political readjustments which took place in Europe. It contributed to the political enfranchisement of Greece, Roumania, Servia, and Bulgaria, and ultimately to the independence of some of them; it brought about the unification of the German and Italian states; it led to the disruption of the unnatural union between Belgium and Holland, and to the rounding out along national lines of the boundaries of various other European states.[1] It is to-day at the basis of some of the largest questions of European politics. It overtops all other questions in the politics of Austria-Hungary where the population is a conglomeration of different races, speaking different languages, having little common sympathy, and each animated by national aspirations of its own. In Austria, Bohemia demands national autonomy, the German element is struggling for supremacy of control, the Czechs are fighting for recognition of their language by the state, etc. In Hungary, the struggle between the various nationalities is intense, almost to the point of disruption. The Magyars demand official use of their language in the army and in the civil service; the Slovaks, Poles, Ruthenians, Serbs, Slowenians, Croatians, and other nationalities represent so many different ideals, tempera-

Ethnic Heterogeneity in Europe

[1] Compare Laveleye, "Gouvernement dans la Démocratie," bk. II, ch. 3. Laveleye quotes Napoleon as once saying, "The government which first raises the flag of nationality and becomes its defender will dominate Europe." *Ibid.*, p. 53.

ments, and elements of dissension.[1] The principle of nationality is at the bottom of the Pan-Germanistic movement, which seeks to unite under a single state organization all the German-speaking populations of western Europe: the German Empire, Alsace, part of Lorraine, most of Switzerland, part of Holland and Schleswig, and part of Austria. It is at the foundation of the Pan-Slav movement, which would unite all the Slavs of eastern Europe under a common scepter: Poles, Slowenians, Moravians, Serbs, Czechs, and Croatians, now found in Prussia, Russia, Austria, Saxony, and Turkey.[2] The same principle would bring together the Scandinavian races: Norwegians, Swedes, and Danes; establish the independence of Finland; secure the autonomy of the Flemish population in Belgium; give home rule to Ireland; and lead to a readjustment of the boundaries between France and Germany and between Italy and Austria.

Duty of the State to secure Ethnic Homogeneity in its Population

Nationality, which is but another name for national kinship, has been a powerful force in bringing into relation petty states and holding them together against the disintegrating forces of sectionalism and particularism, while lack of it has been a potent cause of disruption in many states. Ethnic homogeneity coupled with geographic unity are undoubtedly among the most powerful factors in maintaining political solidarity, and it should be the ambition of every state to organize itself so as to secure these elements of national strength and stability. Struggling nationalities, according to some writers, should be encouraged to separate themselves from unnatural unions and establish independent existences, rather than be suppressed as they were in Europe during the early nineteenth century.[3] Whenever there are within the limits of a state several more

[1] Compare Gumplowicz, "Allgemeines Staatsrecht," pp. 136–156, on the nationality question in Austria-Hungary.

[2] See Pradier-Fodéré, "Traité de Droit int. pub.," vol. I, pp. 130–131.

[3] Compare Lecky, "Democracy and Liberty," vol. I, p. 392.

or less populous nationalities, with widely different customs and degrees of civilization and especially when they constitute distinct geographic unities, the danger of dissension and of disintegration makes it worth while to consider whether the welfare of the peoples directly concerned and the civilization of the world would not be promoted by a voluntary division of the state and its reorganization along national lines. This has happened as a result of revolt and successful war many times in the history of the past, and is likely to happen again in the future.[1] In any case the state should strive by all proper means to render its population ethnically homogeneous and thereby remove one of the most potent sources of national discord. Some writers maintain that where the outlying provinces of a state exposed to the attacks of a dangerous neighbor are inhabited by an alien and disaffected nationality, the state is justified in adopting extreme measures to bring about their assimilation with the rest of the population, and may in case of necessity remove them bodily from the exposed district and deport them to other parts or distribute them throughout the state in such a way as to destroy their national aspirations. This has been justified on the ground that with states, as with individuals, self-preservation is the first law of nature. It was upon considerations of this character that the Emperor Napoleon forced the use of the French language upon the German inhabitants of Alsace and that Prussia is to-day demanding the use of the German language in the schools of the province of Posen. Not widely different in principle is the present policy of the Emperor Francis Joseph in insisting upon the use of a common language in the army of Austria-Hungary, and of the United States in attempting to protect by restrictive

[1] For example, in Austria-Hungary. But a contrary view is expressed by Seton-Watson (Scotus Viator), who maintains, in his "Future of Austria-Hungary" (1907), that the predicted break-up is not only improbable but impossible, and he advances a number of reasons in support of his proposition.

legislation its population against the deleterious effects of an undesirable foreign immigration. Some writers go to the length of holding that the wishes of the local inhabitants are entitled to no respect whatever when considerations of national unity require their annexation to another country. Thus the German argument for the annexation of Alsace was based, not on the theory that the Alsatian population desired annexation to Germany, for as a matter of fact they preferred union with France, but on the ground that they were German in origin and spoke the German language. The French, on the contrary, have defended their designs on the Rhine on the ground that the Rhine is the natural geographical frontier of France, and that the annexation of the territory in question would mean a rounding out and a completion of her national unity. Similarly Italian writers have demanded the annexation or absorption of the Italian-speaking communities in Austria and Switzerland because they are Italian in race and language.[1]

Respect for the Rights of Nationalities

What has been said above in regard to the right of the state within reasonable limits to take extreme measures to preserve itself against the dangers of ethnic heterogeneity in its population must not be understood as an argument in favor of the reckless disregard of the rights of nationalities.[2] Considerations both of humanity and of public policy require that their peculiar customs and institutions should within the limits of national security be respected. Except in extraordinary circumstances, they should be allowed to retain their own language, their local law, and such of their institutions as are peculiar to them and suited to their local conditions. But it is no injustice to small nationalities within the state not to be allowed the use of their language in the national parliament, or in the army, though

[1] Compare Lecky, "Democracy and Liberty," vol. I, p. 394.

[2] On the rights of nationalities see Bluntschli, "Allgemeine Staatslehre," bk. II, ch. 3.

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considerations of convenience, regardless of any question of moral right, usually make it advisable to permit to each nationality the use of its own language in the local governments.

Consolidation of States in the Interest of Nationality

On the other hand, the principle of nationality in its strictest form, in cases where several states are organized within the limits of a single nation, especially if it constitutes at the same time a geographic unity, would require the union of the several states under a common sovereignty, either through voluntary federation or through the absorption of the smaller states by the larger. It was through the latter process that the German Empire and the kingdom of Italy were welded into national states. In each case the more powerful and progressive state within the nation took the initiative and gathered about it such of its neighbors as voluntarily consented to become members of the union, and by compulsion forced the rest to merge their existences into the larger organization; and thus the political boundaries of the new states were brought into approximate harmony with their geographic and ethnic lines. There is no difference of opinion now that the welfare of the peoples directly concerned, the peace of Europe, and the civilization of the world were promoted by the organization of these great national states in the place of the petty commonwealths which formerly existed; and none but the political doctrinaire troubles himself to-day about the means by which this great work was accomplished. Professor Burgess, speaking on this subject, well says: "And who does not see that the further rounding out of the European states to accord still more nearly with the boundaries which nature has indicated would be in the interest of the advancement of Europe's political civilization and of the preservation of the general peace? It would expel the Turk from Europe; it would put an end to the Russian intrigue in the valley of the Danube; it would give Greece the vigor and power to become a real state; and it would bring the petty states of Switzerland, Denmark,

Holland, Luxembourg, Belgium, and Portugal to contribute, in far greater degree, to the political civilization of the world, and receive, in far greater degree, the benefits of that civilization, than their present conditions permit. Even then there would be weak places enough in the boundaries of each national state, but their number would be greatly decreased, and the temptation to invasion which they offer greatly lessened."[1]

Tendency toward the Organization of Mono-national States

The political history of Europe during the past century goes far toward justifying the conclusion that the states of the future are to be national states, not necessarily states whose political, geographical, and ethnic boundaries are identical, but those in which there is a fair approximation to this ideal. Some writers, notably Dahlmann and Von Mohl in Germany, Mancini, Maniani, and Pierantoni in Italy, and Burgess in America, come pretty near to the point of contending for the principle that the boundaries of states and nations should coincide; that is, that there should be a state for every nation and a nation for every state. A strong criticism of this position has been made by Gumplowicz, who asserts that there is no historical or sociological justification for the view that "mono-national" states possess elements of advantage over those composed of a number of nationalities. He asserts, on the contrary, that there is more popular freedom in "poly-national" states than in those whose populations are ethnically homogeneous, and he cites Switzerland, "the freest state in Europe," as an example.[2] Even Bluntschli, who is an extreme advocate of the principle of nationality in the organization of states, admits that ethnic heterogeneity is not an unmixed evil, since the presence of foreign elements in the

[1] "Political Science and Constitutional Law," vol. I, p. 41.

[2] "Allgemeine Staatsrecht," p. 115 ff. For a good review of the doctrines of the Italian school of writers on the question of nationality, see an article by Franz Holtzendorff in the "Revue de Droit international," vol. II, pp. 92–106. See also Lecky, "Democracy and Liberty," vol. I, pp. 391–396.

Alleged Advantages of Ethnic Heterogeneity

state may be a means of "keeping open connection with the civilization of other states" and may "serve as an alloy to give strength and currency to the nobler metal."[1] De Parieu quotes the Emperor Francis II of Austria as once saying to the French ambassador: "My people are strangers to one another and yet it is for the better. They never have the same ills at the same time. In France, when there is an epidemic of fever, you all have it the same day. I have Hungarians in Italy and Italians in Hungary. Each suspects his neighbor; they never understand one another and in fact detest one another. Their antipathies, however, conduce to order and their mutual hate to the general peace."[2]

III. THE ORGANIC THEORY OF THE STATE

Theories concerning the Nature of Society

One of the qualities usually attributed to the state is that of organic unity. A mere mass of human beings unconnected by some sort of unifying bond does not constitute a state or even a society.[3] Concerning the nature and degree of this unifying element a number of theories have been advanced by sociological and political writers. One of these is the so-called *monistic* theory, which conceives organized society to be an association in which the individuals composing it have no really independent existence of their own but are swallowed up, as it were, like atoms in the whole mass, owing all that they are and all that they have to the society of which they are a part. Then there is what has been called the *monadnistic* theory, which goes to the other extreme and considers society as a mere aggregation of individuals or groups, in which there is no real unity, each individual being largely independent of the rest, owing nothing to society, and, except for a sort of accidental juxtaposition, standing in isolation from his neighbors. In

[1] "Allgemeine Staatslehre," bk. II, ch. 4.
[2] "Principes de la Science politique," p. 304.
[3] Compare Worms, "Organisme et Société," p. 7.

the third place, there is the *dualistic* conception, which represents a compromise view. It considers the relation of the individual to society to be one of partial dependence only. His existence is neither merged in that of the whole as though he existed solely for society, nor is he entirely isolated from, and independent of, his social surroundings.[1] Finally, there is the *organic* view, which considers society as analogous in structure to a biological organism, the relation of the individual to the whole mass being similar to that which exists between the cell and the organism of a living being.

The Organic Theory.

The organic theory, says Jellinek, is one of the oldest and most popular theories concerning the nature of the state.[2] Plato compared the republic to a great man and insisted that the best-ordered commonwealth was one whose structural organization resembled most nearly in principle that of the individual.[3] As the whole body feels the pain and sympathizes with an injured member, so, he declared, the whole society is affected by injury to each individual of which it is composed.[4] Cicero likewise drew an analogy between the state and the individual, likening the head of the state to the spirit which rules the human body. The state was personified by medieval writers like John of Salisbury and Marsiglio of Padua; Althusius was fascinated with the biological analogy; and many of the writers of the eighteenth century attached an importance to it out of all proportion to its value. The French Revolution, with its accompanying doctrine that the state was merely an artificial

[1] For the above distinctions see Mackenzie, "Introduction to Social Philosophy," first ed., pp. 131–133; see also Montague, "Limits of Individual Liberty," chs. 3 and 4.

[2] "System der subjektiven öffentlichen Rechte," p. 35.

[3] "De Republica," p. 462.

[4] *Ibid.*, III, 25. Cf. also Aristotle, "Politics," Jowett's ed., p. 113. The comparison of the state with the human organism has been a favorite subject of poets and prose writers. See Shakespeare, "Julius Cæsar," II, 1; St. Paul, Romans xxii, 51; also 1 Cor. xii, 12.

creation, tended to check the spread of the organic theory; but toward the middle of the nineteenth century a reaction against the French philosophy set in, and the conception of the state as an organism came to have numerous advocates.[1] Indeed, the fascination for the organic theory, with its analogies and parallelisms, became so widespread that political science seemed in danger of being appropriated by natural science.[2] One of the most extreme advocates of the organic theory was the noted German scholar Bluntschli, in his "Theory of the State" ("Allgemeine Staatslehre") and in his "Psychological Studies concerning State and Church" ("Psychologische Studien über Staat und Kirche," 1884). The state, he declares, is the very "image of the human organism." [3] Each has its member parts, its organs, its functions, its life processes, and between those of the state and human organisms there exists a deep and striking resemblance. He pushes the biological analogy so far indeed as to impute sexual qualities to the state, it being personified as masculine in character as contradistinguished from the church, to which he attributes the attribute of femininity.[4] His comparison of the structure and life processes of the state to those of the human body is at times almost amusing.[5] The state, to him, is "no mere artificial lifeless machine," but a

[1] Compare on this point Merriam, "Theory of Sovereignty since Rousseau," p. 87 *et seq.* See also Jellinek, *op. cit.*, p. 142 *et seq.*

[2] See Franz, "Vorschule der Physiologie des Staates"; Leo, "Studien zu einer Naturlehre des Staates"; Krieken, "Über die sogenannte organische Staatstheorie" (1873); Bruno Schmidt, "Der Staat als Organismus" in his "Der Staat," sec. 2; and Richard Schmidt, "Allgemeine Staatslehre," vol. I, sec. 18. The word "organism," says Schulze, first appeared in the German literature of political science in Gerber's "Öffentliche Rechte," published in 1852, in a criticism of the theory which had formerly been advocated under other names. For a review of the development of the organic theory in Germany, see Schulze, "Deutsches Staatsrecht," vol. I, pp. 20–23.

[3] "Psychologische Studien über Staat und Kirche," p. 22.

[4] *Ibid.*, p. 39; see also his "Allgemeine Staatslehre," bk. I, ch. 1.

[5] Compare the preface to the English translation of his "Allgemeine Staatslehre," p. v.

"living spiritual organic being." As an oil painting, he says, is something more than a mere aggregation of drops of oil, as a statue is something more than a combination of marble particles, as a man is something more than a mere quantity of cells and blood corpuscles, so the nation is something more than a mere aggregation of citizens and the state something more than a mere collection of external regulations.[1]

The Biological Analogy.

As the animal organism is made up of living members or germ cells, interdependent one upon the other and, upon the whole, each performing its peculiar functions in the life economy of the organism, so the state organism is composed of individuals, not isolated and disconnected like the atoms of an inorganic body, but closely related and dependent upon one another and upon the whole society, somewhat as a limb of the human body or the branch of a tree is dependent upon the main trunk. In origin, structure, and function, say the advocates of the organic theory, there is a striking resemblance between the social body and the animal organism. Each comes into existence through natural rather than artificial processes, each possesses organs whose functions are similar in many respects, and each changes and grows according to laws instead of by mere chance.[2] Rousseau, who saw a close resemblance between the body politic and the human body, compared the sovereign power of the state to the head of an individual; the laws and customs to the brain; the judges and the magistrates to the organs of will and sense; commerce, agriculture, and industry generally to the mouth and stomach which prepare and digest the food; and the public finances to the blood, which a wise economy, through the medium of the heart, distributes throughout the entire organism.[3]

[1] "Allgemeine Staatslehre," p. 192.

[2] For a good statement of the analogy by a French writer, see Collier, "La Souveraineté nationale," p. 21.

[3] Quoted by Leroy-Beaulieu, "L'État moderne et ses Fonctions," p. 96. I am unable to find the analogy in this form in Rousseau's "Le Contrat social," although

Spencer's Biological Comparison

Herbert Spencer, in his "Principles of Sociology," worked out a most elaborate analogy between organized society and the biological organism. Both the animal and social bodies, he affirms, begin as germs, undergo a process of continuous growth, the parts, as they develop, becoming more and more unlike, and exhibiting greater complexity of structure. As the lowest type of animal is all stomach, respiratory surface, or limb, so primitive society is all warrior, all hunter, all hut builder, or all tool maker.[1] As society grows in complexity, division of labor follows, *i.e.* new organs with different functions appear, corresponding to the differentiation of functions in the animal, in which "fundamental trait" they become "entirely alike." In each case there is a mutual dependence of parts, the full performance of the functions of each member being essential to the health and preservation of the rest. If the iron worker in the social organism stops work, or the miner, or the food producer, or the distributor fails to discharge his natural functions in the economy of society, the whole suffers injury just as the animal organism suffers from the failure of its members to perform their functions. Thus the "parallelism between social and animal life" is maintained. The slow but constant replacement of cell tissue and blood corpuscle in the animal organism, by which it is destroyed and reproduced again, we are told, is paralleled by the processes in society, by which it is permanently maintained, notwithstanding the deaths of the component members.[2] Spencer attributes to both the animal organism and the social body a "sustaining system" consisting of alimentation in the former, and production in the latter; a "distributing system" consisting of the circulatory apparatus in the human body, and the transportation system in society; and a "regulatory system," the nervous system in the animal, governments

in bk. III, ch. 11, he compares the legislative power to the heart and the executive to the brain, "which gives motion to all the parts."

[1] Vol. I, pt. II, sec. 217.

[2] *Ibid.*, sec. 217, also chs. 3 and 4.

and armies in the state.[1] In spite of all these elements of resemblance Spencer admits, however, that there is one "extreme unlikeness" in the structure of the body politic and the animal organism. The latter, he says, is *concrete* in structure, that is, its units are bound together in close contact; while the social body is *discrete*, its units being free and "more or less widely dispersed."[2] He readily admits that the difference is "fundamental," though, he says, "upon close examination it will not put comparison out of the question," for it can be shown that "the social aggregate, though discrete, is still a living whole."[3] There is still another difference between the two organisms, he says, which "greatly affects our notion of the ends to be achieved by social organization," namely, the lack of a "nerve sensorium" in the social body. In the animal, consciousness is concentrated in a small part of the aggregate; in the social organism, it is diffused throughout the aggregate. The conclusion of practical politics which Spencer draws from the failure of the analogy at this point is that the welfare of the aggregate in society, considered apart from that of the units, is not an end to be sought; that, in short, society exists for the benefit of its members, not its members for the benefit of society.[4] Upon the *dissimilarity* which he finds between society and the biological organism, or rather upon the *discrete* nature of the social organism, he builds up his individualistic political philosophy, which has seemed to some to be wholly inconsistent with his organic theory of the state.[5]

[1] *Ibid.*, chs. 7, 8, and 9. In the "Westminster Review," in 1860, Spencer published an essay in which he drew a parallel between the up-and-down lines of a railway, which furnishes the circulation of commodities in the social organism, and the arteries and veins of an animal, money being the blood corpuscles and the telegraph wires the nerves. I am unable to find any allusion to this parallel in his collected works, from which it seems to have been wisely omitted.

[2] *Ibid.*, sec. 220. [3] *Ibid.*, sec. 221. [4] *Ibid.*, sec. 222.

[5] Compare Ritchie, "Principles of State Interference," p. 17. Spencer's denial of the existence of a "nerve sensorium" in society was probably the result of his individualistic thinking. After his long argument in support of the organic theory of

Other Advocates of the Organic Theory

The Austrian publicist Albert Schäffle is another writer who has greatly overworked the biological analogy. In four large volumes entitled "The Structure and Life of the Social Body" ("Bau und Leben des socialen Körpers") he examines at great length the anatomical, physiological, biological, and psychological resemblances between society and the animal body and asserts that society is an organism whose protoplasm or unit is man, the state or government in the one corresponding to the brain in the other. His work as a whole exhibits evidence of enormous learning and wide research, and the theory of the organic nature of society is supported with ability and ingenuity.[1] Of a similar character and magnitude is the work of Paul Lilienfeld, a Russian sociologist, whose "Thoughts concerning the Social Science of the Future" ("Gedanken über die Socialwissenschaft der Zukunft"), published in five volumes between 1873 and 1881, constitutes an elaborate exposition of the organic theory, including the laws of social psychology and social physiology. He goes even beyond Spencer and Schäffle in the emphasis which he places on the organic character of society, and in his advocacy of the biological analogy.[2] Among others who have explained and defended the organic theory may be mentioned the French writers: Auguste Comte,[3] Tarde,[4] Letourneau,[5] De Greef,[6] Fouillée,[7] and René Worms;[8] the Polish writer Gumplowicz;[9]

society, it seemed necessary to reconcile his biological theory with his doctrine of individualism by showing that after all there is a difference and that the parts are not dependent on the whole, as they are in the case of the animal organism.

[1] Compare Leroy-Beaulieu, "L'État moderne et ses Limites," ch. 4.

[2] For a statement of the difference between their conceptions see the preface of René Worms to Lilienfeld's "La Pathologie social," p. vii. In the latter work Lilienfeld continues his study of the organic nature of society, considering in particular such topics as the "maladies of the social organism," its "nervous system," the pathology of society, "social therapeutics," etc.

[3] "Positive Philosophy," vol. II, ch. 3.

[4] "Lois de l'Imitation," also his "Division du Travail."

[5] "La Sociologie." [6] "Introduction à la Sociologie."

[7] "La Science sociale contemporaine." [8] "Organisme et Société."

[9] "Sociologische Staatsidee," also his "Sociologie und Politik."

and the Germans Ahrens[1] and Waitz.[2] Of these the French sociologist Worms is to-day probably the most eminent advocate of the organic theory. In his "Organism and Society" he expounds and defends the biological analogy, maintaining that the anatomy, physiology, and pathology of society possess striking similarities to the structure, function, and pathology of living beings.[3]

Criticism of the Organic Theory

If the organic theory meant simply that the state is something more than an aggregation of individuals crowded or massed together without any unifying bond, in other words, that it is a society in which the members individually are in a peculiar sense dependent upon the whole and the whole in turn is conditioned upon the parts, no well-grounded objection to it could be sustained. Even the biological analogy up to a certain point, though subserving little or no practical purpose, is harmless and scientifically unobjectionable, for manifestly there are certain elements of resemblance between the structure and functions of the state on the one hand and those of living beings on the other. But at many points the comparison utterly fails and the resemblance becomes pure fancy. Thus the resemblance between the cells of a biological organism and the human beings who constitute the body politic will be seen upon close examination to be exceedingly superficial. The former are mechanical pieces of matter, with no independent life of their own, each being fixed in its place, having no power of thought or will, and existing solely to support and perpetuate the life of the whole; the latter are intellectual and moral beings, each having a will of its own, possessing the power of foresight, movement, and self-control, and a physical life independent of the whole of which they are a part. Each individual has to a large extent the shaping of his own life; and his place in the organism is not determined for him nor are his activities regulated by central organs. This lack of consciousness and

[1] "Die organische Staatslehre." [2] "Politik," vol. I. [3] See especially ch. 1.

will on the part of the cells of the animal organism and its presence in the state organism is one of the instances where the analogy fails. With the animal organism the dependence of the parts on the whole is essential, and the relation intrinsic; if they are severed from their connection, as a branch from a tree or a limb from an animal, they perish and cease to be living matter. With the state, on the contrary, the separation of a member does not result in destruction, physically speaking; the individual separated from the whole is still an individual.[1] Moreover, the laws of growth, development, decay, and death which govern the life of the human organism are scarcely analogous in any sense to those which reign in the world of politics. An organism grows and develops from within by internal adaptation, not by the addition from without of new parts; while the state changes rather than grows, and does this, for the most part, by the process of formal alteration as a result of volitional power and conscious effort of the members. Its growth, if such it may be called, is largely the result of the conscious action of its individual members and is to a great extent self-directed. The elements of volition and of conscious effort do not enter into the growth of an organism; it changes in obedience to the operation of blind mechanical forces of nature, the parts having no power to alter the direction of its growth or to add to its stature.[2] Indeed, as Jellinek remarks, growth, decline, and death are not necessary processes of state life though they are inseparable from the life of the organism.[3] The state does not originate or renew itself as a plant or an animal does. In fact, to quote Jellinek again, many modern states like the German Empire, Italy, and some of the Balkan commonwealths owe their existences to

Resemblance between the Animal and Social Organism is Superficial

[1] Compare Mackenzie, "Introduction to Social Philosophy," p. 138.

[2] Compare Willoughby, "Nature of the State," p. 37, and Ward, "Psychic Factors of Civilization," p. 299.

[3] "System der subjektiven öffentlichen Rechte," p. 40.

the sword rather than to any cause that may be compared to the procreative or generative processes through which plants and animals come into existence.[1]

Conclusions

Our conclusion must be that the biological analogy, in the form in which it is usually stated, is not only fanciful and absurd, but even mischievous, and would not merit notice were it not relied upon by some respectable writers as the justification of an important theory concerning the relation of the state to the individual members composing it — a subject which will be discussed in a later chapter of this book. Some of these biological comparisons are ingenious and well stated; to many writers they have proved fascinating and seductive; to others they have constituted the basis of an argument for a theory of the state which would sacrifice the individual to society. The organic theory, in the sense in which it is understood by many writers, rests on mere analogy, and we would do well to heed Lord Acton's warning about analogies and parallelisms lest we come to grief. For this reason Jellinek suggests that we had better reject the theory *in toto* lest the danger from the large amount of falsity in the analogy should outweigh the good in the little truth which it contains.[2] It is difficult to see what is to be gained by the attempt to identify or compare the state with an organism. At this stage of the world's political development neither the identification nor the resemblance is necessary to establish the supremacy of the state over the individuals who compose it.[3]

[1] "Recht des mod. Staates," p. 149. [2] *Ibid.*, p. 151.

[3] For criticism of the organic theory see Jellinek, "Recht des mod. Staates," p. 142 ff.; Leroy-Beaulieu, *op. cit.*, ch. 4; Mackenzie, "Introduction to Social Philosophy," ch. 3; Schulze, "Deutsches Staatsrecht," I, 22–23; Leacock, "Elements of Political Science," pp. 80–82; Willoughby, "Nature of the State," ch. 3. Worms, in his "Organisme et Société," ch. 2, examines and answers the various objections to the organic theory.

CHAPTER III

ESSENTIAL ELEMENTS OF THE STATE

Suggested Readings: BLUNTSCHLI, ' Allgemeine Staatslehre," bk. I, ch. 1; bk. III, chs. 1–3; BORNHAK, "Allgemeine Staatslehre," pp. 69–81; CARNAZZA-AMARI, "Traité de Droit international public," vol. I, p. 193 ff.; DESPAGNET, "Cours de Droit international public," pp. 81–84; DUGUIT, "Droit constitutionnel," secs. 24–26; FUNCK-BRENTANO, "La Politique," ch. 2; HALL, "International Law," chs. 1 and 2; HELD, "System des Verfassungsrechts," chs. 4, 5, 12; HUHN, "Politik," ch. 2; JELLINEK, "Recht des modernen Staates," bk. III, ch. 13; VON MOHL, "Encyklopädie der Staatswissenschaften," secs. 18 and 19; MOORE, "Digest of International Law," vol. I, sec. 128; OPPENHEIM, "International Law," vol. I, pt. II, ch. 1; PRADIER-FODÉRÉ, "Traité de Droit international public," vol. I, ch. 2; RIVIER, "Principes du Droit des Gens," vol. I, bk. III, ch. 1; SCHMIDT, "Grundzüge der praktischen Politik," secs. 9 and 10; SCHULZE, "Deutsches Staatsrecht," vol. I, secs. 8–12; TREITSCHKE, "Politik," vol. I, sec. 6; WAITZ, "Grundzüge der Politik," pp. 1–9; WHEATON, "Elements of International Law," ch. 2, sec. 2; WOOLSEY, "Political Science," vol. I, pt. II, ch. 3.

I. PEOPLE

Citizens and Subjects

THE first element which enters into the physical make-up of the state is the population which constitutes its membership. To each inhabitant may be attributed the quality of *citizen* when he is viewed as an active participator in the common will, and of *subject* when he is thought of as a passive member with no share in the public power.[1] Legally all persons within the jurisdiction of the state are, of course, subjects of the state, and in most monarchical countries the term "subject" is commonly employed to designate all who owe obedience, regardless of whether they enjoy full civil and political rights or not. Citizenship is

[1] Cf. on this point Rousseau, "Le Contrat social," bk. I, ch. 6, and Waitz, "Grundzüge der Politik," pp. 21–24.

not necessary to membership in the state for certain purposes, and as a matter of fact there is a more or less numerous body of aliens in every state, who are at the same time members, so far as the right of protection and the duty of obedience are concerned. Citizenship, however, is the normal relation, and the state may insist upon it as a condition to the enjoyment of civil rights as well as political privileges.[1]

Amount of Population necessary to constitute a State

There is no rule or political practice governing the number of persons necessary to entitle a community to recognition as a state; as a matter of fact the populations of the existing states of the world vary quite as widely as the areas of their territories. Some writers in the past have, however, undertaken to lay down within broad lines certain principles which should determine the amount of population necessary to the existence of a state, and some have even assumed to fix exactly the minimum and maximum number of inhabitants; but manifestly any such rules must be arbitrary and worthless. Aristotle was certain that there ought to be a limit. The number, he said, should neither be too small nor too large, but large enough to be self-sufficing and small enough to be well governed.[2] Rousseau, without attempting to fix upon any particular number, laid down the rule that there should be a certain proportion between the population of the state and the extent of its territory. A political body, he declared, may

[1] Compare Bornhak, "Allgemeine Staatslehre," p. 11.

[2] "Politics," VII, 4, Jowett's edition, pp. 214–215; also "Nichomachean Ethics," IX, 10, p. 3. The German writer Schulze in considering this subject asserts very properly that no definite minimum can be fixed except that the population must exceed the number embraced within a single family, that is, it must comprise a "circle" of families. "Deutsches Staatsrecht," vol. I, p. 16. See also Bornhak (*op. cit.*, p. 16), who remarks that a family or a clan may become the nucleus of a state, but until the family has broken up and expanded into a race there can be no state. Hauriou ("Droit administratif," p. 7) lays down the rule that the population must be sufficient to make possible a distinction between public and private affairs. For a full discussion of the subject see Held, "System des Verfassungsrechts," ch. 4.

be measured in two ways, viz. by the extent of its territory and by the number of its people, and there is between these measurements a relation which should give to the state its true dimensions. The extent of land should be sufficient to nourish the inhabitants, and there should be as many inhabitants as the land can sustain.[1] In another place he argued that the larger the population of the state, the less the liberty of the individual, because his share in determining the sovereign will must be correspondingly less.[2] About the nearest approach to a safe rule is to say that the population must be sufficient to provide both a governing body and a number of persons to be governed, and of course sufficient to support a state organization. If the other elements are fully present, this number need not be considerable. Changes in the population of the state, of course, have no more effect upon its corporate existence than do changes in the territorial area. Populations are continually augmented by natural increase and by immigration and decreased by emigration and other causes, but unless the loss is so great as to render the maintenance of a state organization impossible the existence of the state remains unaffected.

II. TERRITORY

A Nomadic People do not constitute a State

Another physical constituent in the make-up of the state is the land or territory which serves as the abiding place of those who constitute its membership. In a peculiar sense territory is the physical basis of the state.[3] "As the state

[1] "Le Contrat social," bk. II, ch. 10.

[2] *Ibid.*, bk. III, ch. 7. Thus, he reasoned, if the population of the state is ten thousand citizens, each citizen's share in determining the sovereign will is one ten-thousandth; whereas if the population is one hundred thousand, his share is only one hundred-thousandth, or one tenth as great.

[3] Cf. Jellinek, "Recht des mod. Staates," p. 73. "*Die Notwendigkeit des Bodens für den Staat ist über allen Zweifel erhoben,*" observes Ratzel in his "Anthropogeographie" (pt. I, p. 66). "*Weil der Staat ohne Boden und Grenzen nicht zu denken ist, hat sich schon früh eine politische Geographie entwickelt, und wenn auch die Staatswissenschaft die Raum- und Lagebedingungen der Staaten oft übersah, so ist*

has its personal basis in the people," says Bluntschli, "it has its natural basis in the land; a people does not become a permanent state till it has acquired a territory." [1] A population unattached to a definite portion of the earth's surface is nothing more than a wandering horde or migratory band. History abounds in examples of nomadic peoples like the Jews after their dispersion and before their settlement in Palestine, the German tribes during their wanderings after the break-up of the Roman Empire, the "trekking" Boers of South Africa after the abandonment of their original lands for a new home to the north, but until they ceased wandering and settled themselves upon a definite portion of territory they never became states, though they may have been states in the making. There can be no such thing as a migratory state. The state, as its etymological meaning suggests, is associated with a fixed abode.[2] Sovereignty is no longer considered personal but territorial.

doch eine den Boden vernachlässigende Staatslehre immer eine vorübergehende Tauschung gewesen."

[1] "Allgemeine Staatslehre," bk. III, ch. 4.

[2] This is the opinion of Jellinek, *op. cit.*, pp. 72–74; Von Mohl, "Encyklopädie," sec. 19; Rivier, "Principes," etc., vol. I, pp. 135–136; Duguit, "Droit constitutionnel," secs. 24–26; Schmidt, "Grundzüge der praktischen Politik," sec. 9; Wheaton, "Elements," ch. 2, sec. 2; Oppenheim, "International Law," vol. I, pt. II, ch. 1; Pradier-Fodéré, "Traité," vol. I, p. 152; Phillimore, "International Law," vol. I, ch. 1; Hauriou, "Droit administratif," p. 7; Bluntschli, "Allgemeine Staatslehre," bk. III, ch. 4; Carnazza-Amari, "Droit int. pub.," vol. I, p. 196; and Held, "System des Verfassungsrechts," ch. 5. The latter writer discusses fully the legal and physical aspects of territory as a constituent element of the state. There are a few writers, however, who do not seem to consider territory as an indispensable element in the constitution of the state. So high an authority as Holland in the definition of the state quoted in the preceding chapter says a state is a numerous assemblage of persons *generally* occupying a certain territory, etc., thus implying the possibility of a non-territorial state. Hall takes the same view. "Abstractedly," he says, "there is no reason why even a wandering tribe or society should not feel itself bound as stringently as a settled community by definite rules of conduct toward other communities," though he confesses that the "circumstances of modern civilization which associate land with sovereignty make the possession of a fixed territory a practical necessity." "International Law," p. 20.

What is included within a State's Territory

The territory of the state consists not only of a definite portion of land, but also of the rivers, lakes, and canals within its limits, and if the state touches upon an open sea it includes in addition a maritime belt generally recognized to be three miles in width measured from low-water mark.[1] Whether this maritime belt is to be considered actually as part of the territorial domain of the state or merely a part of the open sea over which the state is permitted by the law of nations to exercise jurisdiction for certain purposes, there is a difference of opinion among publicists.[2] The territorial domain of the state is not the property of the state or of any ruler; the patrimonial state, in which the monarch was considered the ultimate owner of the land, is a thing of the past. Rulers can no longer, as they often did in medieval times, sell, pawn, give away, or partition their domains as though they were private property.[3] The modern state exercises *imperium*, not *dominium*, over the land embraced within its limits; that is, the ownership of the land belongs to private individuals, subject always, of course, to the right of expropriation by the state for public purposes.[4] The right of private ownership has become so completely dissociated from the old patrimonial idea that cessions of territory to foreign states, according to the public law of the civilized world, are no longer considered as affecting in the least the private ownership of the lands so alienated.

Ownership of the Land is Private, not Public

[1] Hall, "International Law," sec. 30. The Institute of International Law has voted in favor of fixing the maritime belt at six miles instead of three. "Annuaire," vol. XIII, p. 328. For the enforcement of its revenue and sanitary laws the jurisdiction of the state over a wider zone is often asserted and properly conceded.

[2] See Oppenheim, "International Law," vol. I, p. 240, for a discussion of the two views. The increasing importance of the atmosphere for purposes of telegraphic communication and aeronautic transportation is likely in time to raise important questions concerning the extent of the state's control over the atmosphere above its territory. See vol. XIX of the "Annuaire" of the Institute of International Law, on this subject.

[3] On this point see Bluntschli, "Allgemeine Staatslehre," bk. III, ch. 5.

[4] A state may, of course, own large areas of land (this is true, for example, of the United States, Canada, and Australia) in which case it is a proprietor as well as a sovereign and exercises over such lands *dominium* as well as *imperium*.

The territory of the state may be "integrate" and contiguous, like that of Switzerland; or it may be dismembered and a part of it non-contiguous, like that of Great Britain; or it may be an enclave, that is, entirely inclosed within the territory of another state, like the Republic of San Marino, for example, which is an inclosure of Italy.[1]

State Boundaries

State boundaries may be natural or artificial, that is, they may be bodies of water, mountain ranges, deserts, forests, and the like, or mere surveyors' lines marked by posts, monuments, stones, trenches, walls, etc. If the boundary is a navigable stream, the line ordinarily runs through the middle of the most navigable channel, the *filum aquæ* or *Thalweg;* if non-navigable, it follows an imaginary line midway between the two banks. Where mountain ranges constitute the boundary, the dividing line, in the absence of special treaty stipulations, follows the crest of the watershed. Disputes concerning boundaries between states have been common in the past and are not infrequent even to-day among the newer states of the world. During the nineteenth century the boundaries of various European states, notably those of Turkey, Bulgaria, Servia, Montenegro, and Roumania, were adjusted by international commissions created by general treaty arrangements.[2]

Area as a Source of Strength or Weakness

The extent of a state's territory has an important bearing not only on the question of its capacity for self-defense, its power and influence in the family of nations, but to some extent upon the form of its governmental organization and its activities. There is some difference of opinion among practical statesmen as well as political theorists as to whether vastness of territorial domain is a source of strength

[1] Formerly there were numerous examples of enclaves in Germany. Birkenfeld, a part of the Grand Duchy of Oldenburg, is to-day entirely surrounded by Prussian territory.

[2] For a discussion of the subject of boundaries see Oppenheim, "International Law," vol. I, pp. 253–263; Moore, "Digest of International Law," sec. 128; Hall, "International Law," pp. 128–129; Iowa *v.* Illinois, 127 U. S. 1; Keokuk and Hamilton Bridge Co. *v.* Illinois, 175 U. S. 626.

or weakness, especially when part of the territory is non-contiguous, remotely situated, and inhabited by alien races. On the whole, however, the advantage seems to be on the side of empire, and it is the ambition of most modern states to increase the extent of their territories. In recent years we have seen something of a scramble among European states for additional land in Africa, and even the United States, which until lately was satisfied to pursue its destiny on the continent of North America, has acquired extensive dominions beyond the seas.

No Rule as to the Extent of Territory for a State

There is no rule or practice concerning the extent of territory necessary to constitute the home of a state, any more than there is regarding the amount of population. As a matter of fact, states have varied in size all the way from the city states of antiquity to the vast empires of to-day. At the present time they vary from the petty republics of Monaco and San Marino, embracing only a few hundred square miles of territory, to the British and Russian empires and the United States, containing millions of square miles. There have always been small states, both monarchies and republics, and they have maintained themselves by the side of their more powerful neighbors until this day. It is, therefore, absurd, as Bluntschli remarks, to try to fix a limit to their size.[1] During the medieval age the states of Europe were small and numerous. The present states of France, Italy, Germany, and Spain were all divided into a number of petty monarchies and republics. Almost every lordship, says Bluntschli, many towns and even villages maintained independent existences with their own constitutions. But, on the whole, the territorial area of states has increased since the seventeenth century. The modern tendency is toward a consolidation of those whose territories lie within the same geographic unity and whose populations belong to the same nationality; and hence the states of the future in all probability are likely to be more extensive

[1] "Allgemeine Staatslehre," bk. III, ch. 4.

in area than those of the present. The increasing need of the European states for more territory in which to develop their national energy, for the support of their surplus population, and for their expanding commerce has in late years led to an organized movement among them to take possession of such uninhabited portions of the globe as remain unclaimed. Within a very few years the greater part of Africa has, as has been said, been partitioned out among the powers of Europe. So rapid has been the movement that it has been impossible to take effective possession of these vast territories except at a few accessible points, and the consequence has been the invention of a curious political institution, known as the "sphere of influence," as a means of delimiting the share of each claimant.[1] The practice of leasing territories from other states for commercial, military, and naval purposes, where they cannot be purchased or otherwise acquired, has also recently been adopted by a number of governments.[2]

Limits to the Size of a State

About all that can be said in regard to the extent of territory is that it ought to be large enough to sustain the population. Rousseau, in his "Le Contrat social," discussed the subject at some length and attempted to lay down certain general principles regarding the size of the state as he did in regard to the amount of population. Nature, he declared, has fixed a limit to the territory of the state as to the stature of a well-proportioned man. It ought not to be too vast in extent to be well governed nor too small to maintain itself. Administration, he asserted, becomes difficult at great distances, as a weight becomes heavier at the end of a long lever. It becomes more onerous in proportion as degrees are multiplied, and it enforces the laws in remote communities with less vigor and celerity, while the people feel

[1] See Keltie, "Partition of Africa," ch. 23.

[2] Within recent years Great Britain, Germany, and Russia have leased territory from China; the United States from Cuba; Belgium from Great Britain on the Upper Nile; and France from Great Britain on the Niger.

less affection for a government with which they rarely come in contact.[1] Some writers, in discussing the subject, distinguish between democracies and monarchies. The natural limit of a democracy, said Madison, is that distance from the central point which will just permit the most remote citizens to assemble as often as their public functions demand, and will include no greater number than can join in those functions; so that the natural limit of a republic is that distance from the center which will barely allow the representatives to meet as often as may be necessary for the administration of public affairs.[2] Alexander Hamilton pointed out that vast extent of territory contributes to the natural strength of the people, while smallness of territory encourages usurpers to make attempts upon their liberties. The smaller the territory, he said, the more difficult for the people "to form a regular or systematic plan of opposition," while the larger the territory, the more "competent the people to a struggle with the attempts of the government to establish a tyranny." [3]

Territorial Extent not the Measure of a State's Greatness

Nevertheless, as Bluntschli remarks, the power of a state is not always to be measured by its mere extent.[4] Thus France and Germany, with nearly one tenth the territory, are more powerful states than Russia. The European territory of Great Britain comprises only about half the superficial area of either Germany or France, yet without

[1] "Le Contrat social," bk. II, ch. 9.

[2] "The Federalist" (Ford's ed.), p. 83.

[3] See "The Federalist," No. 28, also No. 63. It was one of Montesquieu's maxims that liberty flourishes most in small states. In large states, he argued, the necessity of holding together widely separated regions and of reconciling conflicting interests due to geographical isolation requires strong government and a corresponding abridgment of freedom. But many instances could be given to show the fallacy of this proposition. Equally fallacious is his theory that cold climates are favorable to liberty and warm ones to servitude and that democracy is better adapted to barren soils than is monarchy. "Esprit des Lois," bks. 14, 17, and 18. For a criticism of Montesquieu's theories of the effect of geographical influences on liberty, see Laveleye, *op. cit.*, vol. I, bk. IV, chs. 10, 11, 12.

[4] "Allgemeine Staatslehre," bk. III, ch. 4.

its dependencies it would compare favorably in power and influence with either. The Greek city states were petty indeed in point of territory, yet Athens took her place by the side of Rome in the history of the world. A state with vast extent of territory, especially when a part of it is non-contiguous and remote, is difficult to defend in war, and vigilance as well as power may be necessary to protect the outlying dependencies.

Effect of the Size of a State on its Form of Government

A city state or a country state of small area is obviously better suited to certain forms of government and methods of administration than a state of vast area where some of the parts are remotely situated from the seat of government. A pure democracy might be successful in the former when it would be unworkable in the latter. The republican form of government, Jellinek observes, is well adapted to small states, while monarchy, as a rule, is better suited to large ones, though he admits that recently the success of certain great democratic republics has thrown doubt on the rule.[1] "There is," says John Stuart Mill, "a limit to the extent of country which can be advanta-

[1] "Recht des mod. Staates," p. 74. Montesquieu, as is well known, recommended a small extent of territory for republics ("Esprit des Lois," bk. 9, ch. 1). "The history of the world," wrote De Tocqueville, "offers no instance of a great nation retaining the form of a republican government for a long series of years. . . . It may be advanced with confidence that the existence of a great republic will always be exposed to far greater dangers than that of a small one. . . . All the passions which are most fatal to republican institutions spread with an increasing territory, while the virtues which maintain their dignity do not augment in the same proportion." "Democracy in America," tr. by Reeves, vol. I, p. 170. In the debates on the Constitution of the United States in 1788 the argument was advanced that the territorial extent of the union was "too vast and too differently circumstanced to make a general government possible." See "The Federalist," No. 1. Madison answered the objection that a republican government must be confined to a small district by pointing out that the objection was due to a confusion of republican government with a democracy. "Federalist," No. 14. Jefferson wrote, in 1801, of the triumph of the Democratic party: "It furnishes a new proof of the falsehood of Montesquieu's doctrine that a republic can be preserved only in a small territory. Had our territory been only a third of what it is, we were gone." Ford's edition of "The Federalist," p. 50. But, says Ford, time would have justified the predictions of the objectors but for the changed conditions wrought by the railroad and telegraph. *Ibid.*, p. 6, note 1.

geously governed or even whose government can be conveniently superintended from a single center." "There are," he said, "vast countries so governed; but they, or at least their distant provinces, are in general deplorably ill administered, and it is only when the inhabitants are almost savages that they could not manage their affairs better separately." [1]

Effect of Changes in Area on the Existence of the State

The enlargement or reduction of the territorial area of the state does not ordinarily affect its international capacity or interrupt the continuity of its life. Sardinia, for example, was enlarged to nearly four times its original area and its name changed, yet its identity was never considered destroyed nor its treaty obligations impaired. Prussia, after the peace of Tilsit in 1807, lost nearly one third of its territory; Saxony by the treaty of Vienna in 1815 was reduced to one half its former size; France in 1815 and 1871, Turkey in 1829 and 1878, Austria in 1859 and 1866, Mexico in 1848, — all lost more or less considerable portions of their territory but in no case was the corporate existence of the state affected.[2] As an international entity the state, however, may cease to exist by being annexed to another state, by voluntarily merging itself into another state, by being absorbed, or by partition of its territory among neighboring states.

Influence of Topography and Climate

Geographical situation and the shape and conformation of the territory, as well as extent of domain, have an important bearing upon the institutions and national life of the state. These factors determine the occupations and industries of the people, the extent and variety of the nat-

[1] "Representative Government," ch. 17. Cf. also De Tocqueville: "It may be asserted as a general proposition that nothing is more opposed to the well-being and the freedom of man than vast empires. . . . If none but small nations existed, mankind would be more happy and more free." "Democracy in America," vol. I, p. 171.

[2] Compare on this point Martens, "Traité de Droit international," vol. I, sec. 68; Rivier, "Principes," vol. I, pp. 63–65; Moore, "Digest of International Law," vol. I, p. 248; Oppenheim, "International Law," vol. I, pp. 114–118.

ural resources, and to some extent the national character and even the laws, institutions, and activities of government.[1] Many of the great political writers of the past, like Plato, Aristotle, Machiavelli, Bodin, Montesquieu, Comte, and Hume, dwelt upon the influence of natural phenomena upon the character and institutions of nations. Buckle, in his "History of Civilization," emphasized to the point of exaggeration, as has been said, the influence of climate, soil, and food upon the industrial, intellectual, and political development of certain states.[2] Montesquieu, in his "Esprit des Lois" (bks. 14–18), undertook to establish a connection between climatic influences and the laws of the state and between the fertility of the soil and forms of government. His conclusions, however, abound in paradoxes, and his estimate of the effect of climatic influences was greatly exaggerated.[3]

Influence of Geographic Unity

That the course of history — economic, social, and political — has, however, been determined at many points by geographical factors is incontestable.[4] The existence of the

[1] Von Mohl, "Encyklopädie der Staatswissenschaften," p. 131; Jellinek, "Recht des mod. Staates," bk. III, ch. 13, tit. 1; Treitschke, "Die Politik," vol. I, sec. 6; Ratzel, "Anthropo-geographie," p. 531 ff; Zacharia, "Vierzig Bücher vom Staate," bk. 9; and Huhn, "Politik," ch. 1.

[2] Ch. 2. For an argument against the view that climatic influences determine national character, see Hume's essay on "National Character," "Essays," vol. I, p. 21. Hume says, "I do not believe that man ever in his spirit or destiny owed any thanks to atmosphere, food, or climate."

[3] Sorel's Montesquieu (trans. by Anderson), pp. 140–141; see also Pollock, "History of the Science of Politics," p. 83.

[4] On this point see George, "Relation of Geography to History"; Semple, "American History and its Geographical Conditions"; Smith, "Geography of the Holy Land"; Ratzel, "Politische Geographie der Vereinigten Staaten von Amerika," also his "Anthropo-geographie"; Freeman, "Historical Geography of Europe"; Keltie, "Applied Geography." "To a trifling geographical incident," says Shaler, "we owe the isolation of Great Britain from the European continent; and all the marvelous history of the English folk, as we all know, hangs upon the existence of that narrow strip of sea between the Devon coast and the kindred lowlands of northern France." "The independent political development of England for the last thousand years," he continues, "has been in a large part due to the measure of protection afforded by the British Channel. While every other country on the continent

petty states of ancient Greece, and the virtual failure of all attempts to unite them, separated as they were by intersecting mountain ranges and arms of the sea, afford one of the earliest and most striking illustrations of this truth. Nothing is clearer than that geographic isolation is unfavorable to political unity. It not only retards, in the beginning, the unification of neighboring races, but also the union of different communities of the same race; it promotes prejudices and want of sympathy, and, when political union has once been established, particularism and disunion. Moreover, lack of geographic homogeneity determines to a certain extent the activities, if not the form, of government. People occupying the different parts of a state which are separated from each other by high mountain barriers, impenetrable deserts, or large bodies of water develop local peculiarities and have local needs which require special legislation. An insular state like England is not only economically dependent upon distant parts of the world, but by reason of its exposure to attack from the outside must give constant attention to questions of national defense.[1] The fact that Switzerland has maintained its local life comparatively undisturbed by the powerful states about it for more than a thousand years is due largely to the geographical conditions which

of Europe, except Scandinavia, which is itself largely a geographical isolation, has felt again and again the tread of conquering armies, this group of islands has been exempt from successive invasions. Many were attempted, and some would have succeeded without the geographical barrier which nature had interposed." "Nature and Man in America," pp. 153, 159.

[1] Of the influence of geographic conditions upon the politics of England, Professor Shaler says: "In the wonderful state of Great Britain the national life functions vary with reference to the topography of high Asia, the climate and surface of Africa, and certain portions of other countries; and almost every storm and every drought which affects the remotest lands and seas reacts upon that state. Ministers, and with them the purposes of the state, are changed by the chance of some battlefield at the antipodes. A bad harvest in the plains of the upper Mississippi means dear bread in England, fewer marriages, and shorter lives; in other words it produces an effect upon the social status of the country." "Nature and Man in America," p. 149.

environ its folk. It might also be shown that the distinctive political ideas and institutions of the Dutch have been determined to some extent by the geographical situation of that country and the heroic struggle with nature which it has entailed.[1]

III. GOVERNMENT AND SOVEREIGNTY

Necessity of Political Organization

A third essential mark of the state is the existence of an agency through which the collective will may be ascertained and expressed and the ends of the state realized. This agency, magistracy, contrivance, or organization we call government. A mere mass of people occupying a particular portion of territory do not constitute a state until they have organized themselves politically and established a civil government. They must, in short, possess a juristic personality and have a common will.[2] The governmental organization may be simple and its functions few and restricted in their sphere of operation, but there must be a political agency of some kind; there must be governors and governed — some who command and others who obey. If there are none who possess authority and none who obey, remarks Bluntschli, there is no state but only a condition of anarchy.[3] In the great states of to-day the governmental organization is vast in extent and complex in structure, but, as in the case of territory and population, quantity and extent are not the tests of statehood. The simple rudimentary government of an African prince, if capable of commanding and enforcing obedience, fulfills the requirements of political organization.

Sovereignty

A final constituent political principle of the state is sovereignty, in some respects the most important and distinctive

[1] Cf. Keltie, "Applied Geography," p. 7.

[2] Cf. Schulze, "Deutsches Staatsrecht," vol. I, p. 17; Hauriou, "Droit administratif," p. 7; Von Mohl, "Encyklopädie," p. 72; Jellinek, "Recht des mod. Staates," pp. 152–155; Duguit, "Droit constitutionnel," p. 19.

[3] "Allgemeine Staatslehre," bk. I, ch. 1.

of all the marks of state organization. In popular usage, sovereignty means the original, supreme, and unlimited power of the state to impose its will upon all persons, associations, and things within its jurisdiction; in short, it is that quality of the state by virtue of which it may command and enforce obedience to the exclusion of all other wills. In popular usage the term also has reference to the independence of the state from foreign control, that is, its right to live its life and pursue its ends independently of the will of other states. The former attribute is sometimes described as internal sovereignty, the latter as external sovereignty. Sovereignty is thus a concept both of municipal law and of international law. Whatever may be the differences of opinion regarding its nature and abiding place, the majority of writers are agreed that there can be no state without sovereignty. There must be some supreme power which in the last analysis is entitled to lay down commands and able to compel obedience.[1] It is this which distinguishes the state from all other associations and organizations. Take it away and the state becomes a mere voluntary pact or association.

Nevertheless, a few writers of high standing do not consider sovereignty to be an essential element of state existence. There are many communities, they maintain, which have their own constitutions and systems of internal administration, and hence may be rightfully described as states, though they may be under the control, wholly or in part, of other states, so far as their foreign relations are concerned.[2] Such are the so-called protectorates and

[1] "Sovereign and subject, governors and governed," says Gumplowicz ("Allgemeines Staatsrecht," p. 23), "are the everlasting, unchangeable ear-marks of states. There are no states without this principle and no such principle without the state."

[2] See, for example, Westlake ("International Law," vol. I, p. 21), who maintains that external sovereignty is not essential to constitute a state in international law. Westlake maintains the distinction between sovereignty and independence. The former, he says, admits of degrees, while the latter does not, and hence a state may be partly sovereign, but not partly independent. Yet he says elsewhere that from

suzerain communities which abound in Africa orient. Some of them are free from outside contr as their internal polity is concerned, and sometim large extent as regards their foreign relations. So them send and receive diplomatic representatives least consuls, and sometimes they conclude commercial conventions or treaties. Such communities are classified as dependent or part-sovereign states, but according to the strict tests of political science they are not states, but parts of other states. They may become states by shaking off their real or nominal dependence, but until then they are in legal contemplation mere dependencies of other states.

IV. OTHER ATTRIBUTES AND ASPECTS OF THE STATE

Elements of Permanence and Continuity

Land and people, government and sovereign power, are thus the indispensable, eternal marks of the state. But states possess other qualities and characteristics in addition to these. Most writers, for example, attribute to the state the qualities of permanence and continuity.[1] It is not meant by the quality of permanence, however, that a particular state once established endures as such forever, for as a matter of fact history abounds in examples of states whose existences have been terminated through absorption by other states or through a voluntary merging of their existences into that of other states. Indeed, it would be quite pos-

the standpoint of international law there are undoubtedly states not in all respects independent (*ibid.*, p. 87); see also Rivier, *op. cit.*, vol. I, p. 52; and Oppenheim, "International Law," vol. I, p. 101, who maintains that while a state normally possesses "independence all round and therefore full sovereignty," yet there are states "which certainly do not possess full sovereignty and are therefore named not full sovereign states." Such, he says, are protectorates, suzerain communities, and members of so-called federal states, which possess "supreme authority" and "independence with regard to a part of their tasks," though they are not "full, perfect, and normal subjects of international law."

[1] Compare Von Mohl, "Encyklopädie der Staatswissenschaften," p. 71; Bluntschli, "Allgemeine Staatslehre," p. 26; Burgess, "Political Science and Constitutional Law," vol. I, p. 52.

sible for the existence of a state to be terminated by the voluntary withdrawal of the inhabitants from its territory or their compulsory removal, or by the perishing of the entire population in a common disaster.[1] What is meant by saying that the state is a continuous and permanent establishment — *eine dauernde Einrichtung*, as the Germans describe it — is, that since the state is essential to the happiness, if not the very existence, of mankind, the world must continue under state organization for all time. No other organization or association can fulfill its purposes, and whenever a particular form of state disappears, another will succeed to its place, and thus the continuity of its life will be preserved. It is not to be understood, of course, that changes in the governmental organization or internal polity of the state necessarily destroy or interrupt its continuity.

Effect of Changes in Governmental Organization

The governmental organization of the state, in fact, is not infrequently changed by revolution, or through legal alteration, yet the corporate existence of the state itself continues unimpaired and unaffected. Governments are not immortal; they are merely the agents or instrumentalities through which the state for the time being acts, and they may be changed or superseded at the will of the sovereign. Monarchies may be transformed into republics and republics into monarchies, the rank and titles of rulers may be changed, absolute principles may be superseded by constitutional principles, without legal effect upon the identity of the state, its corporate personality, its rights or its obligations. Only when the internal changes in its structure result in prolonged anarchy is the existence of the state itself involved. France, for example, set aside its dynasty, transformed its government from a monarchy to a republic, then to an empire, again to a monarchy, then became a republic again, again an empire, and is now a republic for the third time, but the continuity of the state as such has remained unchanged through

[1] Cf. Oppenheim, "International Law," vol. I, p. 118.

all the political transformations through which it has passed.[1]

Other Aspects in which the State may be viewed

The state manifests itself also under other forms and reveals other qualities and attributes, depending upon the multifarious points of view from which it is considered. Viewed objectively, it reveals itself to us as a concrete working organization, not a mere mental abstraction or collectivity of individual will relations. Considered subjectively, it appears to us, as the etymological derivation of the word implies, as a condition or status rather than a dynamic organization.

The State as a Juristic Concept

Looked at from still another viewpoint, the state is primarily a social phenomenon; an association for the realization of the common social interests of mankind. Some writers, looking at it from another viewpoint, lay great stress on the state as a legal concept, — *ein Rechtsbegriff*, as the Germans say. They dwell upon its character as a juristic person, a corporation of public law, the bearer of public rights and obligations. The juristic personification of the state has always been a favorite theme of a certain class of German and French writers. Some of them, following the theories of the Roman law, have attributed to it only a limited juristic personality, while others have emphasized its character as a real juristic person in the strictest sense of the word.[2]

Continental European writers generally dwell upon

[1] On the continuity of the state see Oppenheim, "International Law," vol. I, p. 115 ff.; Moore, "Digest of International Law," vol. I, p. 249; Pradier-Fodéré, "Traité de Droit int. public," vol. I, p. 155; Hall, "International Law," 3d ed., p. 22; Rivier, "Principes du Droit des Gens," vol. I, p. 62.

[2] See Gierke's "Das Deutsche Genossenschaftsrecht." Gierke conceives the state to be a "*Genossenschaft des öffentlichen Rechts*" rather than a "*Körperschaft des öffentlichen Rechts.*" For this he is criticised by a recent writer who declares "*Der Staat ist keine Genossenschaft sondern eine Körperschaft des öffentlichen Rechts; derselbe ist den physischen Personen nicht bloss im Bezug auf Erwerb und Verlust von Rechten, sondern auch im Bezug auf Entstehung und Untergang gleichgestellt.*" Werner Rosenberg, "Über den Staatsbegriff," in the "Zeitschrift für die gesamte Staatswissenschaft," 1909, Erstes Heft, pp. 49–51.

The State as *Fiscus*

the distinction between the state as a public governmental power — a *Körperschaft des öffentlichen Rechts* — which legislates, commands, and exacts obedience, on the one hand, and its character as a fiscal personality or ordinary corporation of private law, on the other hand. As *fiscus* the state is a concept of private law, capable of entering into all or almost all the relations of private law. As such it enters into contractual engagements very much as a private individual or corporation does; acquires, owns, and administers property; employs agents; brings suits in the courts and sometimes allows itself to be made a party to suits at the instance of private persons. Thus the state possesses both a public and a private character, exercises *imperium* and *dominium*, governs and transacts business, etc.[1] On the continent of Europe the distinction between the state as a public power and as *fiscus* possesses great practical importance owing to the rule generally prevailing there that the government is responsible to the individual in damages for violations of contracts to which it is a party as well as for torts committed by its officers and agents. This liability of the state as *fiscus* is enforced by suits brought by the injured individual either in the ordinary judicial courts, as in Germany, or in special administrative tribunals, as in France. In England and the United States, where the idea of the state as a corporation has had less development and where the legal responsibility of the state to the individual through suits for damages is hardly recognized by the public law of either country, the distinction between the state as a public corporation and as *fiscus* is of less importance.

[1] See Jellinek, "Recht des mod. Staates," bk. III, ch. 12; Hatschek, "Die rechtliche Stellung des Fiscus im bürgerlichen Gesetzbuch"; Duguit, "Droit constitutionnel," pp. 120–121; Hauriou, "Droit administratif" (5th ed.), p. 372; Michoud, "Théorie de la Personnalité morale"; and "La Responsabilité de l'État," in the "Revue de Droit public," 1895, vol. II, p. 2 ff.; Bornhak, "Preussisches Staatsrecht," vol. II, p. 47 ff.; Du Crocq, "Cours de Droit administratif," secs. 1055 *et seq.*; Goodnow, "Administrative Law," vol. II, p. 149 *et seq.* and 161 *et seq.*

The Idea *versus* the Concept of the State

Finally, some writers, especially Germans, distinguish between the *concept* of the state (*Staatsbegriff*) and the *idea* of the state (*Staatsidee*). The *concept* of the state, says Bluntschli, presents us a picture of actual states from the standpoint of their nature and essential characteristics; the *idea* of the state is that of the state in the splendor of imaginary perfection, the state not yet realized in fact, but toward which mankind should strive.[1] The distinction is not entirely fanciful, though the accuracy of the terminology may be open to question. What is intended, is to distinguish between a concrete state as it actually is or as it has existed in history and the state in the abstract, no particular state but the state in general. The one is the result of concrete thinking, of inductive logic; the other of philosophical speculation and abstract reasoning.[2] "The *idea* of the state," says Burgess, "is the state perfect and complete; the *concept* of the state is the state developing and approaching perfection. From the standpoint of the *idea* the state is the world viewed as an organized unit. From the standpoint of the *concept* the state is a particular portion of mankind politically organized. The former is the real state of the perfect future; the latter the real state of the past and the present and the imperfect future. With the progress of mankind and the development of the world the two will tend to become identical."[3]

[1] "Allgemeine Staatslehre," p. 34.

[2] Compare Willoughby, "Nature of the State," p. 14.

[3] "Political Science and Constitutional Law," vol. I, p. 49.

CHAPTER IV

THE ORIGIN OF THE STATE

Suggested Readings: BLUNTSCHLI, "Allgemeine Staatslehre," bk. IV, chs. 7–9; BORNHAK, "Allgemeine Staatslehre," pp. 15–19; BROWNSON, "The American Republic," chs. 3–6; BURGESS, "Political Science and Constitutional Law," vol. I, bk. II, ch. 2; DEALEY, "The Development of the State," ch. 2; FOUILLÉE, "La Science sociale contemporaine," chs. 1 and 2; HELD, "System des Verfassungsrecht," ch. 11; HOBBES, "Leviathan" (MOLESWORTH's ed.), chs. 13, 14, 17, 18; HUME, Essay, "Of the Original Contract," "Essays," vol. I; JELLINEK, "Recht des modernen Staates," bk. II, ch. 7; JENKS, "History of Politics," chs. 2 and 3; LEACOCK, "Elements of Political Science," chs. 2 and 3; LILLY, "First Principles of Politics," ch. 2; LOCKE, "Two Treatises of Government" (ed. by MORLEY), bk. II, chs. 2, 3, 4, 7, 8; LOWELL, "Essays on Government," Essay No. 5; MAINE, "Early History of Institutions," ch. 3; also his "Early Law and Custom," ch. 7; and his "Village Communities," ch. 1; MCKECHNIE, "The State and the Individual," pt. I, ch. 2; MCLENNAN, "The Patriarchal Theory," ch. 1; MULFORD, "The Nation," ch. 4; POLLOCK, "History of the Science of Politics," chs. 2 and 3; POSADO, "Tratado de Derecho Politico," bk. III; REHM, "Allgemeine Staatslehre," secs. 66–69; RITCHIE, "Darwin and Hegel," ch. 7; also his "Natural Rights," ch. 3; ROUSSEAU, "Le Contrat social," bk. I, chs. 6, 8; SEELEY, "Introduction to Political Science," lect. III; TREITSCHKE, "Politik," vol. I, sec. 4; WILLOUGHBY, "Nature of the State," chs. 3 and 4; WOOLSEY, "Political Science," vol. I, sec. 62.

I. PRELIMINARY OBSERVATIONS

Beginnings of State Life unrecorded

INQUIRY into the circumstances surrounding the origin of the state belongs largely to the realm of theory and speculation. History records the principal facts regarding the establishment of particular commonwealths by men already accustomed to political life; it tells us how and under what circumstances state organization has spread to new lands hitherto unoccupied or inhabited by people politically unorganized, and how new forms of state organization have superseded other forms. But the cir-

cumstances and conditions under which primitive men first saw the light of political consciousness and came to associate themselves together under some form of political organization are facts veiled largely, if not wholly, in the mists of obscurity. Authentic history throws little light on the subject, and we must look for the most part to the new sciences of sociology, ethnology, and anthropology to help us in fathoming the mystery.

Aristotle tells us that the state was the highest and last of the associations formed by man, as it was the only self-sufficing one — that is, the only one capable of satisfying all the needs of man. We are therefore probably safe in saying that it has existed in some form, rudimentary or otherwise, wherever civilized men have lived together in any considerable numbers. But our knowledge concerning the nature of this early authority and of the procedure by which it was established rests largely on inference and generalization rather than upon historical proof.

II. THE THEORY OF DIVINE ORIGIN

Various theories concerning the original institution of political authority have been advanced by historical and political writers, but as yet it can hardly be said that there is any common agreement among them as to the true origin.[1]

Meaning of the Divine Theory

The oldest of these theories, as Jellinek remarks, is that which attributes the establishment of the state, mediately or immediately, to God or some superhuman power.[2]

[1] It is not always clear from the discussions of the theories of state origin whether, in a given case, an attempt is being made to account for the origin of the state as a historical fact, or to explain its justification; that is, the right of the state to be. The two questions are, of course, separate and distinct, but they were so often confused by the early writers that it is frequently impossible to tell which one they were seeking to explain.

[2] "Recht des mod. Staates," p. 180. See also Bluntschli, "Allgemeine Staatslehre," bk. IV, ch. 7; Duguit, "Droit constitutionnel," pp. 21–25; Willoughby, "Nature of the State," pp. 42–53; Woolsey, "Political Science," vol. I, pp. 196–198 and 497–500.

The theory assumes that the will of God was made known by revelation mediately or immediately to certain persons who were his earthly vicegerents, and by them communicated to the people by whom obedience was a religious as well as a civil duty. The divine theory, as an explanation of both the historical origin of the state and its justification, was widely defended in earlier times, when many of the chief political writers were at the same time churchmen and theologians. Biblical support for it is found in such passages as Paul's admonition to the Romans: "Let every soul be in subjection to the higher powers; for there is no power but of God; and the powers that be are ordained of God." [1]

Early Support of the Theory

During the Middle Ages this doctrine became a sort of Christian dogma and was at the bottom of the teaching that rulers of states were the anointed representatives of God. The celebrated Augsburg Confession of 1530 placed the stamp of approval on it when it declared that "all authority, government, law and order in the world have been created and established by God Himself." The idea that in some form the state is an institution of God and that rulers govern by divine right, that there is "a divinity that doth hedge a king," lasted until the end of the eighteenth century and in some countries even later. The theory was especially strong in France, where the claim that the "king of France holds his kingdom and his sword only from God" was frequently asserted in the controversies between the French kings and the Papacy.[2]

Modern Assertions of the Theory

We find the same claim put forth in the famous treaty of the Holy Alliance concluded in 1815 between the sovereigns of Austria, Russia, and Prussia, where it was solemnly asserted by their Majesties that they looked upon themselves as being delegated by Providence to govern their peoples, that the Christian nations of which they and their subjects were a part acknowledged no sovereign but God, to Whom

[1] Romans xiii, 1. [2] Duguit, "Droit constitutionnel," p. 23.

belonged all power, and that their duties as rulers were pointed out to them by the same divine authority.[1] The idea in less extreme form is still maintained by some of the rulers of Europe to-day, notably by the present German emperor, who has frequently asserted the claim to rule by divine right.[2] The belief of the masses of the common people in the divinity of kings still persists in parts of eastern Europe, but as a doctrine of political philosophy it received its death blow at the hands of Grotius, Hobbes, and Locke.[3] The doctrine of divine right has had its advocates among political writers, no less than among kings. Bossuet, a noted writer of the seventeenth century, in his "Politics as derived from the Scriptures," boldly asserted that God established kings as His ministers through whom He ruled over His people, like a father over his children, and who were accountable only to Him for their acts. The Protestant monarchomachs of the sixteenth century, the Spanish Jesuits, and the noted Filmer in his "Patriarcha," written in the middle of the seventeenth century, taught essentially the same doctrine.[4]

Views of James I of England

James I of England, before his accession to the throne, in a short treatise entitled "The True Law of a Free Monarchy," laid down the dogma that kings rule by divine right and that subjects have no recourse against them, and he supported his claims by arguments drawn both from the Scriptures and the law of nature. Upon these high authorities he affirmed the doctrine of the sacrosanctness of the royal office and declared that as it is blasphemy to dispute

[1] Article II.

[2] Cf. Duguit, "Droit constitutionnel," p. 23, and Schierbrand, "Germany," pp. 17, 21.

[3] Willoughby, "Nature of the State," p. 50. For a somewhat extravagant defense of the idea that there is a certain divinity about kings which serves to secure the loyalty of the masses to the government, see Bagehot's "The English Constitution," ch. 3, especially pp. 112, 127, 146.

[4] Jellinek, *op. cit.*, p. 183; Dunning, "Political Theories from Luther to Montesquieu," p. 328.

what God can do, so it is presumption and high contempt to dispute what a king can do.[1]

Theocratic Doctrines no longer accepted

Of the merits of the theocratic theory as an account of the historical origin of the state, there is now little difference of opinion among political philosophers. The doctrine that the state was established by an ordinance of God, that its magistrates are divinely appointed, that they are accountable to no authority but God, the ruler and lawgiver of the state, now has few supporters.[2] The fact is, the state is no more the direct and immediate creation of a supernatural power than any of the multifarious associations into which mankind has entered. The authority which the state exercises, whatever its origin, must be exercised through human agencies and must be humanly interpreted, that is, in the last analysis, it is only what the state chooses to make it.

Element of Truth in the Theory

We may accordingly dismiss the doctrine of divine right with the statement that it never was anything more than an invention of men, designed to bolster up the claims of certain rulers to hold their crowns independently of the will of the people and to govern absolutely and without accountability to any authority except such as they might choose to render to God. If the theory meant simply that the Creator implanted in the breast of man the instinct for order and the impulse which manifests itself in political organization, we could accept it.[3] Or, if it meant that

[1] Dunning, p. 215. Compare on this point Mulford ("The Nation," ch. 4), who says: "The nation has a divine foundation and has for its end the fulfillment of the divine end in history. . . . There is no human ground on which it can rest. They who are intrusted with it hold it as representatives of the nation and as the ministers of the divine purpose in the nation. The President and the Congress, as the Crown and the Parliament, rule by the grace of God" (p. 56). For a similar view see Brownson's "American Republic," p. 126.

[2] Bluntschli, *op. cit.*, bk. IV, ch. 7; Duguit, *op. cit.*, p. 25; Jellinek, *op. cit.*, p. 185.

[3] Compare Burgess, "Political Science and Constitutional Law," vol. I, pp. 60–61; also Hume, "Of the Original Contract," who says: "As it is impossible for the human race to subsist at least in any comfortable or secure state, without the protection of government, this institution must certainly have been intended by that

magistrates should rule in accordance with the precepts and teachings of the Christian religion, and that they owe a moral accountability to God for the manner in which they exercise their power, few would dissent. Or, if it meant that the life of the state began under religious influences and that in its earlier stages of development it had a distinct theocratic cast, we should be bound to accept the theory.

Influence of Religion among Primitive Peoples

The idea that rulers are directed and supported by a supernatural power is very strong among primitive peoples. They are accustomed to call religion to their aid and to seek a religious sanction for their important acts. Obedience to the state is inculcated by them as a religious duty, and religious worship is usually supported by their governments. Thus Rome had its national religion and its own national gods, and the whole of the *jus sacrum* was regarded as a part of the Roman public law.[1] In the early stages of the life of the state the ministers of religion are the dominating class, the lawgivers, the statesmen, and the judges. The names of Numa Pompilius in Rome, Lanfranc, Anselm, and Wolsey in England, Mather, Hooker, Cotton, Edwards, and Davenport in North America, belong almost as much to political as to ecclesiastical history.[2] The pillars of the early state, says Burgess, are usually churchmen; the priestly class are exalted above the rest of society, and the unfaithful are denied membership in the state.

beneficent Being who means the Good of all his creatures. But he did not establish government by any particular or marvelous interposition but by his conceded and universal efficiency. A sovereign cannot, properly speaking, be called his vicegerent in any other sense than that every power or force being derived from him may be said to act by his commission."

[1] Cf. Schulze, "Deutsches Staatsrecht," vol. I, p. 661.

[2] On the political influence of the early New England clergy, see Osgood, "History of the American Colonies in the Eighteenth Century," vol. I, p. 218. They were, says Osgood, the chief expounders of the public law of the commonwealth, and their utterances on questions of public policy are among the most valuable and authoritative that we have. Their advice was frequently sought, they delivered addresses before the legislature, they coöperated in forming the New England Confederacy, and no affair of government was indifferent to them. With the magistrates they constituted for half a century the governing class of Massachusetts.

III. THE COMPACT THEORY

Social Compact Theory

A theory of state origins which has profoundly influenced the political thought of Europe and America for two centuries is that which is popularly described as the "social compact" or the "social contract." [1] This theory ascribes the institution of political authority to contract or convention, that is, to the deliberate and voluntary agreement of the members of the community who, through the instrumentality of a covenant, organize themselves into a body politic. This explanation of how the state originated, as well as of its right to be, has had many advocates since the seventeenth century and has furnished the pretext, if not the justification, for numerous revolutions and the institution of new governments in the place of old ones.[2] Most of its advocates assume, to start with, the existence of a pre-social or a pre-civil condition of mankind, antecedent to the establishment of the state, in which men were unrestrained by the prescriptions of positive human law, but were subject only to those of the moral law, the law of nature or the instincts of reason. This hypothetical condition or status, says the philosopher Thomas Hill Green, is "a state in which every individual is free to do as he likes, and from which individuals escape by contracting themselves out." [3] This condition of society is described by the writers on the compact theory as the state of nature, the *status naturalis*.

The State of Nature

Early Expounders of the Theory

The first modern writer to expound at length the compact theory of the origin of civil society was a clergyman of the

[1] Some writers employ the term "compact," others prefer "contract," while still others use both terms without discrimination. Little, if anything, is gained by insisting on a distinction between the two terms. Compare Ritchie, "Darwin and Hegel," p. 210; and Clark, "Practical Jurisprudence," p. 144.

[2] Cf. Bluntschli, "Allgemeine Staatslehre," bk. IV, ch. 9.

[3] "Political Obligations," p. 33. On the compact theory see Jellinek, "Recht des mod. Staates," pp. 194–210; Esmein, "Droit constitutionnel," p. 171 ff.; Lowell, "Essays on Government," ch. 4; Gierke, "Genossenschaftsrecht," p. 88; Story, "Commentaries," vol. I, pp. 225–227.

Church of England, Richard Hooker, in a treatise entitled "Ecclesiastical Polity," published in 1594; and, singularly enough, the theory was invented, or at least employed by him, to defend the Established Church against the attacks of its enemies.[1] Political conditions in England at that time were such as to place the popular mind in a position of receptivity for the acceptance of a theory which conditioned royal authority only upon the consent of the people and which considered the relation between king and people as contractual in character. In the next century Grotius, in his epoch-making treatise on the "Law of War and of Peace" (1625), Milton, in his "Tenure of Kings and Magistrates," Pufendorf, in his "Law of Nature and of Nations," Spinoza, in his "Tractatus Politicus," and more especially Thomas Hobbes, in his "Leviathan," published in 1651,—all advocated the contract theory, the latter elaborating and defending it at great length and with distinguished ability.

In the same century the doctrine of contract reached its full fruition and found its most powerful advocate in John Locke, whose "Two Treatises of Government" was published in 1690, and in the next century by J. J. Rousseau, who, in his "Le Contrat social," gave to the theory a popularity that it had never before attained. In the political thought of America during the revolutionary era the doctrines of the "law of nature," the "state of nature," and the "compact" theory of society occupied a dominant place. With the statesmen of the Revolution the idea that contract was the legitimate basis of authority, that government rests on consent, and that no government is entitled to the allegiance and obedience of its subjects unless they have agreed to its establishment, was almost a part of the religious belief of the people.[2]

[1] Hooker's philosophy later became the basis of Sidney's and Locke's doctrines in their attack on Filmer. Cf. Jellinek, *op. cit.*, p. 198.

[2] See Merriam, "American Political Theories," p. 49. The compact view is thus

Distinction between the Social and the Political Compact

Before proceeding farther with a consideration of the doctrine of the social compact it will be well to distinguish between the two applications which have been given to the theory. In the first place, the "compact" theory may be, and has been, employed to describe an association or agreement among the members of a community, still in a state of nature, by which civil authority is established. In the second place, it may refer to an agreement or a relation between the people of a community already politically organized, on the one hand, and a particular magistrate or ruler, on the other. In the first case, the parties to the compact are the individuals of the community, each with one another and with all; in the second place, the parties are the whole society in its corporate capacity, on the one hand, and an agent or ruler, on the other. By some writers the former is described as the *social* compact, the latter as the *political* or *governmental* compact.[1] The one represents the act by which men in a state of nature establish a political or civil society; the other the act by which a political society already established institutes a particular government.[2] One represents a theory of the origin of the state, the other a theory of the institution of a particular government. The first transaction, therefore, necessarily precedes the

stated in the preamble to the constitution of Massachusetts (1780), "The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good." See also the constitution of New Hampshire (1792) for a similar declaration.

[1] Ritchie, "Darwin and Hegel," p. 210; Willoughby, "Nature of the State," p. 55.

[2] Compare Locke ("Two Treatises of Government," ch. 19, sec. 211, of Morley's edition), who recognized the distinction between the "social contract" and the "governmental contract." Rousseau, however, maintained that there was but one contract in the process by which the state of nature was transformed into the civil state, namely, the original association, the social contract. Only society, not government, he asserted, was instituted by contract. Government was established by two acts of authority, the creation of the office and the appointment of the magistrates. "Contrat social," bk. III, ch. 16. See also Green, "Political Obligations," pp. 80–92.

latter in point of time and is an essential preliminary condition to the establishment of the latter. Thus the people of a given community may organize themselves by covenant into a political society without making a compact with a particular ruler or governing body, but they cannot contract with a ruler until they have become a political society and hence have acquired that corporate capacity without which contracts cannot be entered into by bodies of men.

History of the Compact Theory

The idea that the authority of rulers rests on compact or contract between them and the people is as old as Plato, and its supporters have been able to cite in support of the theory numerous historical examples from the Old Testament. Such, for instance, were the covenants between the elders of Israel and David by which the latter was anointed king,[1] between God and His people relative to the installation of Saul as king,[2] between Josiah and the people on the one hand and the Lord on the other,[3] the covenant which God made with Noah after the flood,[4] and many others. The principles of the Roman law of contract also gave support to the idea, and the great Roman jurist Ulpian seems to have considered the relation between the Roman emperor and the people as being in the nature of a compact.[5] Throughout the Middle Ages and the early modern period the theory of the contractual basis of political authority exerted great influence upon the political thought of the time, but it should be remembered that it was not the theory of the origin of civil society — not the original social compact — but the theory of the relation between the people and their magistrates, between the state and its governing authority.[6] In this form it had such advocates as Hooker,

[1] 2 Samuel v, 3. [2] 1 Samuel x. [3] 2 Kings xxiii, 1–3.

[4] See Jellinek, *op. cit.*, p. 196 ff.; also Locke, "Civil Government," bk. II, ch. 18.

[5] On this point Sir Henry Maine remarks that "long before the theory of the social compact had clothed itself in definite shape the phraseology of the Roman contract law had been largely drawn upon to describe that reciprocity of rights and duties which men had always conceived as existing between sovereigns and subjects." "Ancient Law," 3d ed., p. 345.

[6] Jellinek, *op. cit.*, p. 197.

Milton, Buchanan, Johannes Althusius, Languet, Filmer, Grotius, Pufendorf, and others. Instances of actual contracts between people and kings are, however, few, and those which have been relied upon are hardly such as to establish the claims of the theory as a historical fact.[1]

An Explanation of the Relationship between the People and their Rulers

Nevertheless it is sometimes maintained that if the theory cannot be successfully defended as descriptive of an actual historical transaction, it can at least be accepted as a rational interpretation of the relationship which exists or should exist between the people and their rulers. In the sixteenth and seventeenth centuries, when the struggle against absolutism was well under way, the theory came to be relied on as a justification of the right of the people to depose their rulers when they were guilty of violating the terms of the compact made or supposed to have been made between them and their subjects.[2] It was, for example, appealed to in justification of the deposition of Queen Mary by the Scots, who asserted that "royal power was nothing else but a mutual covenant or stipulation between king and people," [3] — an idea which had been enunciated and defended by one of their countrymen, George Buchanan, in his "Rights of Kings among the Scots," published in 1579. The doctrine of contract was not defended by political writers alone; it was sometimes admitted by kings themselves as expressing the proper relation between them and their subjects. Thus we find

[1] An example sometimes cited was the agreement between the nobles of Aragon and their king, which was embodied in the following formula: "We who are as good as you choose you for our king and lord, provided that you observe our laws and privileges; and if not, not." Quoted by Ritchie from Robertson's "Charles V," in his "Darwin and Hegel," p. 202.

[2] Thus said Hooker, "Every particular person advanced into such (regal) authority hath at his entrance into his reign the same bestowed on him, as an estate in condition by the voluntary deed of the people, in whom it doth lie to put by any one and to prefer some other before him, better liked of or judged fitter for the place." "Ecclesiastical Polity," bk. VIII, ch. 2, sec. 8. Essentially the same opinion was expressed by Languet in his "Vindiciæ Contra Tyrannos."

[3] Quoted by Milton in his "Tenure of Kings and Magistrates."

James I of England confessing in an address to Parliament in 1609 that "the king binds himself by a double oath to the observation of the fundamental laws of his kingdom, tacitly as by being a king and so bound to protect as well the people as the laws of his kingdom; and expressly, by his oath at his coronation, so as every just king in a settled kingdom is bound to observe that paction made to his people by his laws, in framing his government agreeable thereunto according to that paction which God made with Noah after the Deluge." [1] Eighty years after this royal deliverance the English people appealed to the "paction" theory as a justification for the deposition of James II and the election of a new sovereign to succeed him. The Convention of 1689, which declared the throne vacant and which fixed the crown on William and Mary, asserted that James had "endeavored to subvert the constitution of the kingdom by breaking the original contract between king and people" and with having "violated the fundamental laws." [2]

Justification for the Deposition of Kings who violate their Oaths

Turning now from the theory of the political or governmental compact which seeks to explain or interpret the relation between society and its rulers, if not the actual transaction by which particular magistracies are instituted, we come to consider in the next place the theory of the social compact, the primary original association, through which the state of nature is transformed into the civil state and the natural man into a citizen with legal rights and duties.

As already stated in an earlier part of this chapter, the writers who have supported the theory of the social compact have predicated as a theoretical starting point the existence of a pre-civil or pre-political condition of mankind which they describe as the "state of nature," though they differ

The State of Nature

[1] Quoted by Locke, "Civil Government," bk. II, ch. 18.

[2] Gardiner, "Students' History of England," p. 646. See also Jellinek, *op. cit.*, p. 198.

in important particulars concerning its real character. Hobbes, who was the first writer to attempt to describe in detail the state of nature, considered it to be a state of perpetual strife among the members of the society; a war, potential if not actual, of all against all (*bellum omnium contra omnes*); a state of constant struggle, of fierce and brutal competition, and of distrust and suspicion, the hand of each being against all.[1]

Hobbes on the State of Nature

This condition, Hobbes argued, was the inevitable result of the inherent egoism of man, who by nature is a self-seeking creature, with a "perpetual and restless desire of power," a desire for the gratification of his appetites, a craving for glory which ends only with his death. Men in the natural state, he said, were like famished wolves, seeking to devour one another.[2] Natural right, which to him was simply natural might, Hobbes defined as nothing more than "the liberty that each man hath to use his own power for the preservation of his own nature." In such a state of society there could, of course, be no distinction between legal right and wrong, or of justice or injustice, for there is no law, and in the absence of law there can be no such things as justice or injustice, right or wrong.[3] Might alone under such circumstances determines right, and to every one belongs whatever he has the physical power of appropriating and keeping.[4]

[1] "The Leviathan," ch. 17. Hooker, before Hobbes, had undertaken to describe the state of nature, but only in a brief way. His views of the condition of the natural man were similar to those advanced by Hobbes. See Dunning, p. 211.

[2] Cf. also Spinoza, "Tractatus Politicus," ch. 2, sec. 14, and ch. 5, sec. 2 (Duff's ed.), where it is maintained that men in a state of nature are enemies. Cf. also Montesquieu's estimate of the "natural" man as a "timid, weak, trembling creature, occupied chiefly in panic-stricken flight from the dangers which surround him." "Esprit des Lois," bk. I, ch. 2.

[3] Cf. Dunning, p. 270; also Rousseau ("Contrat social," bk. I, ch. 8), who observes that natural liberty, unlike civil liberty, has no limits but the strength of the individual; see also Ritchie, "Natural Rights," p. 83.

[4] For further discussion and criticism of Hobbes's theory of the state of nature see in addition to the authorities already cited: Jellinek, *op. cit.*, pp. 200–213; T. H. Green, "Political Obligations," pp. 60–67; Huxley, "Natural and Political Rights,"

Locke on the State of Nature

To Locke, on the other hand, the state of nature appeared to be not necessarily a state of brutal strife among wild men, but rather one in which peace and reason prevail, for man is not, as Hobbes maintained, inherently vicious, but is animated generally by the instincts of reason and justice. He defined the state of nature as a "state of perfect freedom to order their actions and dispose of their persons as they think fit, *within the bounds of the law of nature*, without asking leave or depending upon the will of any other man."[1] But though this be a state of liberty, he continues, yet it is not a state of license. "The state of nature has a law of nature to govern it, which obliges every one; and [also a law of] reason, which is that law [which] teaches all mankind who will but consult it . . . No one ought to harm another in his life, health, liberty, or possessions, for all are the workmanship of one omnipotent and infinitely wise Creator."[2] There being no common authority empowered to enforce the law of nature, Locke observed that "every man hath a right to punish the offender and be executioner of the law of nature,[3] even to the taking of life, thereby freeing society of a criminal who having renounced reason and the laws of God hath declared war against all mankind, and may be destroyed as a lion or a tiger. And this in accordance with the great law of nature, 'whoso shedeth man's blood, by man shall his blood be shed.'"[4] Locke's conception of the state of nature thus differs from that of Hobbes in that while, according to him, the liberty of the individual is not limited by human law, yet it is limited by the law of nature and the dictates of reason; and hence the "natural" man has a right, not to everything he is physically capable of appropriating, but only to such

in his Essays ("Methods and Results"); Woolsey, "Political Science," vol. I, sec. 62; and Pradier-Fodéré, "Principes généraux de Droit de Politique," etc., p. 22.

[1] Again he says, "Men living together according to reason without a common superior on earth with authority to judge between them is properly in the state of nature." "Two Treatises of Government," bk. II, ch. 3.

[2] *Op. cit.*, bk. II, ch. 2. [3] *Ibid.*, sec. 8. [4] *Ibid.*, sec. 11.

things as he can use without depriving others of a similar advantage.[1] In short, with Locke natural liberty is not the same as physical power; it is rather might limited by the natural right of others.

Inconveniences of the State of Nature

Concerning the existence of a law of nature, Locke says "it is certain that there is such a law, and that, too, as intelligible and plain to a rational creature and a studier of that law as the positive laws of commonwealths, nay, possibly plainer."[2] Nevertheless, he did not regard the state of nature as an ideal condition. He admitted that there were "many things wanting" in such a state. Although man in the state of nature, he said, is the "absolute lord of his own person and possessions, equal to the greatest and subject to nobody," yet the enjoyment of his wide freedom is "very uncertain and constantly exposed to the invasions of others," while the enjoyment of his property is "very unsafe and very insecure."[3] First of all, there is the want of an established known law received and allowed by common consent to be the standard of right and wrong and the common measure to decide all controversies between them. "For though the law of nature is plain and intelligible to all rational creatures, yet men, being biased by their interest as well as ignorant for want of study of it, are not apt to allow of it as a law binding to them in their application of it to their particular cases." There being no common judge or authority to interpret the law of nature and settle disputes in accordance with that law, each individual must be both judge and executioner and the "inconveniences" are very great where men are judges

[1] Cf. Ritchie, "Darwin and Hegel," p. 188. The difference between Hobbes and Locke is much more one of psychology than of belief as to historical fact. Locke recognized, as Hobbes did not, that among the natural instincts and emotions of men the altruistic play just as prominent a part as the selfish ones.

[2] *Op. cit.*, bk. II, ch. 2, sec. 12. Cf. also Hooker, who says of the laws of nature, they "do bind men absolutely even as they are men, although they never have any settled fellowship, never any solemn agreement among themselves what to do or not to do." "Ecclesiastical Polity," bk. I, sec. 10.

[3] *Ibid.*, bk. II, ch. 9.

in their own cases. In short, in the state of nature, "every man must be his own law court, and every man his own policeman." Locke's view that the state of nature was not a condition of warfare and struggle but rather one of peace and order, though somewhat wretched and inconvenient, was in substance the view of Milton in his "Tenure of Kings and Magistrates" (1649), and of the German jurist Pufendorf in his "De Jure Naturæ et Gentium," published in 1672. They conceived the state of nature rather as a pre-political than a pre-social state, that is, a condition of society in which men were united by social bonds, but yet without political organization, whereas Hobbes identified the state of nature with a condition of society still in a virtual state of savagery.[1]

Rousseau on the State of Nature

The French writer Rousseau, the third of the great triumvirate of political philosophers to expound and popularize the social compact theory, conceived the pre-political state of mankind to be one approaching the ideal rather than an actual primitive historical condition. In his "Discourse on Inequality," published in 1754, he declared it to be in some respects the happiest period of human existence. In "Le Contrat social" (1762), where he elaborates his views more at length, he describes the state of nature as one "where all is common" and where "I owe nothing to those to whom I have promised nothing. I recognize as belonging to others only what is not useful to me. This is not the case in the civil state where all rights are fixed by law."[2] Again he says, "Man is born free and he is everywhere in chains."[3] From a condition of primitive

[1] Compare on this point Dunning, *op. cit.*, p. 319. [2] Bk. II, ch. 6.

[3] Bk. I, ch. I. The fallacy of Rousseau's theory that the state of nature is one of perfect freedom has been well shown by Thomas Hill Green. In such a state says Green, "men must have been thwarting each other and only those could be free who were not equal to the rest, who by virtue of their superior power could override the rest." "Political Obligations," p. 70. A state, however, organized and conducted according to Rousseau's notions, would have been more of an ideal to him than the pre-civil condition.

simplicity in which man was unfettered by the shackles of authority, where he was free to live his life without being bound by the artificial bonds of human laws, he has been driven by his own inherent sinfulness into the civil state, where he is more or less a slave to the whims of authority.

Poetic imaginations have often pictured the state of nature as an earthly paradise, in which happiness, innocence, and the joys of unrestricted freedom abound without limit, where equality reigns, where the yoke of law and the burdens of state press upon the shoulders of no man and where none are subjects and none sovereigns.[1] But we are safe in saying that no such condition of society ever had any existence except in the imagination of the poet or the philosopher. If any considerable numbers of the human race ever lived in a state of nature, so called, the conditions could not have been very different from what Hobbes conceived them to be.[2]

"Escape" from the State of Nature through a Covenant

Escape from this intolerable condition took place, we are told, through the process of compact or covenant; that is, the men of the community "contracted" themselves out of the natural state into a civil state. The advocates of the compact theory all agree that in general this was the manner of escape, though they differ as to the exact nature of the procedure. Thus, observes Hooker, there is no relief for mankind from the "grievous injuries and wrongs" of the pre-civil state but by "growing into composition and agreement amongst themselves by ordering some kind of public government, by yielding themselves subject

[1] Compare, for example, Pope's "Essay on Man" (III, 148), "The state of nature was the reign of God"; and Shakespeare's portrayal of it is a state where there was

> "No occupation; all men idle, all;
> And women, too, but innocent and pure;
> No sovereignty."
>
> —"The Tempest," Act II, scene 1.

[2] Compare Bluntschli, *op. cit.*, p. 284. Locke admits that "we seldom find any number of men who live any time together in this state." *Op. cit.*, Morley's ed., p. 259.

thereunto." [1] According to his view, the social and political compact were successive parts of the same process, the one being a preliminary stage of the other. That is, the people first covenanted among themselves to submit to a common superior, and then in their organized capacity they chose a particular ruler and entered into a compact with him by which they promised obedience in return for protection.[2]

Hobbes's View

It was, said Hobbes, as if each individual should say, "I authorize and give up my right of governing myself to this man or this assembly on this condition, that thou give up thy right to him and authorize all his actions in like manner." [3] Thus there is a mutual surrender of natural rights and a bestowal of all "power and strength" upon a common superior in return for better secured legal rights and the substitution of a single will in the place of a multitude of conflicting wills. Each individual surrenders for the common benefit his natural right to do what he will and receives in return the assurance of protection and security in that which he has or may rightfully possess. Thus, according to Hobbes, there is, in addition to the fundamental original pact by which the state is created, a subsidiary pact, by which each man agrees to obey the person or assembly who is the choice of the majority. "This done, the multitude so united in one person is called commonwealth or in Latin a *civitas*, and the person or persons upon whom this power is bestowed is called the sovereign and all others are subjects." The covenant thus made is irrevocable without the consent of both parties to the contract.

Locke's View

"I readily grant," says Locke, "that civil government is the proper remedy for the inconveniences of the state of

[1] "Ecclesiastical Polity" (Morley's ed.), p. 93. [2] *Ibid.*, bk. VIII, ch. 2, sec. 8.

[3] "Leviathan," ch. 17. "Weary of the state of war, individuals by a covenant agree to devolve their personality, to use the language of the Roman law, upon some individual or collection which is henceforth to represent them and to be considered as acting with their combined powers." Quoted by T. H. Green, "Political Obligations," p. 61.

nature which must certainly be great where men may be judges in their own case." [1] Nevertheless, he asserts that certain kinds of civil government (or misgovernment) are worse than the state of nature (or anarchy), the "inconvenience being all as great and as near, but the remedy farther off and more difficult." [2] The answer therefore to the question whether civil government is preferable to the state of nature depends on the character of the government. On the whole, the "inconveniences" and "uncertainties" of the natural state outweigh the advantages, and men are soon "driven into society," where they "take sanctuary under the established laws of government and therein seek the preservation of their property." According to Locke, the transformation occurs through the action of the people in "incorporating" themselves into a body politic "wherein the majority have a right to act and conclude the rest." [3] They "covenant" with each other to establish a government, — a covenant they are bound by the law of nature to observe, — and out of this covenant the obligation of obedience and submission arises.[4] "There and there only," he said, "is political society where every one of the members hath quitted the natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it." [5] This is the original social compact by which civil society is established in the place of the natural state, not the governmental compact between an already organized society and a particular sovereign.

Hobbes's and Locke's Views compared

According to Locke, the covenant is between people and king; [6] according to Hobbes, the king was not a party, but

[1] "Two Treatises of Government" (Morley's ed.), p. 197.
[2] *Ibid.*, sec. 225. [3] *Ibid.*, sec. 95.
[4] Cf. Green, "Political Obligations," p. 69.
[5] *Op. cit.*, ch. 7, sec. 87.
[6] Ritchie denies that the covenant described by Locke was between king and people. He holds that the original compact upon which Locke bases government is, just as with Hobbes and Rousseau, a compact among individuals (" Darwin and

only the people each with all. Hobbes considered that the authority bestowed on the sovereign was not through agreement but rather through the surrender of certain rights to him. Not being bound himself as a party to the agreement, he could not be deprived by deposition of the authority bestowed upon him, and hence to resist him was to return to the state of nature. In other words, the right of the sovereign to rule is irrevocable and indefeasible.[1] Locke, on the other hand, regarding the king as a party to the covenant, held that he might forfeit his office through a violation of the terms upon which he was vested with authority. Hobbes was in fact the apologist and defender of the Stuart pretensions to rule by divine right; Locke was the exponent and advocate of the principles of the English Revolution against the absolutism of the Stuart kings.

Rousseau on the Transition from the Natural to the Political State

Rousseau's idea of the social compact was, as has been said, that of the "original association" by which the state of nature was transformed into the civil state, not the act by which a particular government was instituted. There is, he said, but one contract and that is the agreement to form a civil society. That done, a government is established by a legislative act authorizing the government and an executive act appointing the magistrates, but there is no contractual element in the process.[2] He thus agreed with Hobbes in holding that the king was no party to the compact, but, unlike Hobbes, he maintained that the surrender of rights was not to a monarch, but to the whole society. "Each of us," he said, "puts his person and

Hegel," p. 206). See also his note in the English translation of Bluntschli's "Allgemeine Staatslehre," p. 295, where he asserts that Locke's theory is almost identical with that of Rousseau.

[1] "Leviathan," ch. 14. "This covenant," says Hobbes, "being in the nature of the case irrevocable, the sovereign derives from it an indefeasible right to direct the actions of the society over which it is sovereign." *Ibid.*, ch. 17. See also Green, "Political Obligations," p. 61.

[2] "Contrat social," bk. III, chs. 16 and 17. But how could a "legislative act" precede the establishment of a government? Manifestly Rousseau's reasoning is less logical than that of Hobbes.

faculties into a common stock under the direction of the general will, and we receive each member as an indivisible part of the whole." This "act of association produces a moral and collective body" or a "public personage," which formerly took the name of "city," but is now called a "republic" or "body politic." It is called the *state* when passive, the *sovereign* when active, and a *power* when compared with its equals.[1] Rousseau, unlike Hobbes, upheld the sovereignty of the people rather than the absolutism of the king. According to Hobbes, the passage from the state of nature to the civil state is through a surrender of rights to a sovereign; according to Locke, through the institution of a common superior, to secure rights which already existed in the natural state; according to Rousseau, through the surrender of rights, not to a sovereign king, but to the sovereign people.[2] Regarding the nature of the original association by which the "passage" from the pre-civil state was effected, he said, "each man giving himself to all gives himself to none; and there is not an associate over whom he does not acquire the same right as is ceded, an equivalent is gained for all that is lost, and man is free to keep what he has."[3] Again he remarks, "What man loses by the social contract is his natural liberty and an unlimited right to anything that tempts him which he can obtain; what he gains is civil liberty and the ownership of all that he possesses."[4] The passage from the state of

[1] "Contrat social," bk. I, ch. 6.

[2] According to John Austin the transition from the "natural" to the civil state involved three stages: (1) the future members of the state to be created jointly resolve to unite themselves into an independent political society. This may be called the *pactum unionis*. (2) This done, they jointly determine the constitution of its government. This may be called the *pactum constitutionis*. (3) Then follows an exchange of promises between the inchoate sovereign and his inchoate subjects, the latter agreeing to obey the former, who in turn promises to govern according to the constitution. "Jurisprudence" (Student's edition), p. 129.

[3] *Ibid.*, bk. I, ch. 6.

[4] *Ibid.*, bk. I, ch. 8. "Instead of destroying natural equality," says Rousseau, "the fundamental compact substitutes, on the contrary, a moral and legitimate

nature to the civil state, continued Rousseau, produces in man a very remarkable change, by substituting in his conduct justice for interest and giving to his actions a moral force which they lacked before. True, he loses "several advantages" by the change, but the others gained are so very great in comparison that he ought to "bless without ceasing, the happy moment which took him forever from it [the state of nature] and made of a dull stupid animal an intelligent being — a man." [1]

Blackstone on the Substitution of Political for Natural Liberty

The idea that man in passing from the state of nature to the civil state exchanges his natural liberty for civil liberty was supported by many writers of Rousseau's time and thereafter. Blackstone stated the nature of the transaction and the advantages of the change as follows: "Every man when he enters society gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man that considers a moment would wish to retain the absolute and controlled power of doing whatever he pleases, the consequence of which is, that every other man would also have the same power, and then there would be no security to individuals in any of the enjoyments of life. Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty, so far restrained by human laws

equality for that which nature may have given of physical inequality among men, and while they may be unequal in strength or genius they become equal by agreement and right." *Ibid.*, bk. I, ch. 9.

[1] *Ibid.*, bk. I, ch. 8. Compare also Kant, who, speaking of the institution of the state, said, "All and each of the people give up their external freedom in order to receive it immediately again as members of a commonwealth and the act by which they are constituted into a state is termed the *original contract.*" "Rechtslehre," Eng. trans. by Hastie, p. 169.

(and no farther) as is necessary and expedient for the general advantage of the public." [1]

IV. CRITICISM OF THE COMPACT THEORY

Critics of the Theory

The doctrine that the state originated in compact or contract enjoyed a wide popularity during the seventeenth and eighteenth centuries, but during the nineteenth it underwent a searching criticism, if it did not receive its death blow, from the hands of such scholars as Ludwig von Haller, Jeremy Bentham, Sir Henry Maine, Thomas Hill Green, Edmund Burke, Professor Bluntschli, Sir Frederick Pollock, Professor Ritchie and many others. Indeed, before the publication of Rousseau's celebrated "Contrat social," the English philosopher Hume had demolished the theory by showing the inconsistency of contract as the relation between the governed and the governors.[2] Bentham did not consider the theory worthy of extended consideration, and after referring approvingly to Hume's "demolition" of the theory, dismissed it with the following remark, "I bid adieu to the original contract; and I left it to those to amuse themselves with this rattle, who could think they needed it." [3] Sir Henry Maine asserts that nothing could be "more worthless" than such an account of the origin of society and government as that given by Hobbes,[4] while Sir Frederick Pollock characterizes it alto-

[1] "Commentaries on the Laws of England" (Chase's ed.), p. 64. The doctrine that rights are surrendered when the passage to the civil state takes place is, as Woolsey remarks, utterly false ("Political Science," vol. I, part III, ch. 2). "No rights which may properly be called rights are surrendered especially if the state be just. If they are rights which properly belong to the individual in the state of nature, they will not only be continued but legally defined and guaranteed. The idea is a pure fiction. The state is an institution for defining and protecting rights, not for abridging or destroying them." See also Ritchie, "Natural Rights," and Fouillée, "Science sociale contemporaine," ch. 2.

[2] See his treatise, "Of Human Nature," bk. III, part II (1740), and "Of the Original Contract" (1752).

[3] "Fragment on Government," ch. I, sec. 36.

[4] "Early History of Institutions," p. 356.

gether too harshly as one of the "most successful and fatal of political impostures." [1]

Theory Unhistorical

In the first place the theory is unhistorical. As we have already said, history does not afford a single well-authenticated instance of a state which came into existence through deliberate and voluntary agreement among men who were not already accustomed to political authority.[2] Historically, observes T. H. Green, the theory is a fiction.[3] The classical example usually cited by the advocates of the theory is that of the famous Mayflower compact, by which a body of emigrants to America in 1620 entered into an agreement whereby they "solemnly and mutually, in the presence of God and of one another, covenanted and combined themselves together into a civil body politic for their better ordering and preservation." "When Carlyle objects that Jean Jacques could not fix the date of the social contract," says Professor Ritchie, "it would at least be a possible retort to say that the date was the 11th of November, 1620." [4] But upon examination this as well as the other instances relied upon by the advocates of the theory will be seen to be not examples of the founding of new commonwealths by men in a state of nature, but merely the transplanting to new lands of political institutions by men already subject to political authority. Indeed, in the case cited above, the transaction was nothing more than the extension of an already existing state to a country not yet inhabited by civilized races. The Mayflower covenanters, in fact, expressly acknowledged that they were "loyal subjects" of an existing sovereign, instead of men trying to escape from the state of nature.[5] If the compact theory

The Mayflower Compact

[1] "History of the Science of Politics," p. 75.

[2] Compare Bluntschli, "Allgemeine Staatslehre," bk. IV, ch. 9.

[3] "Political Obligations," p. 63. [4] Darwin and Hegel," p. 214.

[5] The founding of the commonwealth of Massachusetts, whose constitution asserts that the people have entered into "an original, explicit, and solemn compact with each other," is sometimes cited also as furnishing the historical proof, but in reality it is only an empty declaration, not the record of a historical fact.

meant nothing more than that the extension of the state to new territories, by men already subject to state organization or the creation of a new state form in the place of one already existing, is sometimes the result of convention, historical examples in abundance could be cited.

Political Consciousness assumed

In the second place, the theory must be rejected upon grounds of philosophy and reason. It is impossible to believe that men in a state of nature could have "contracted" themselves into the civil state by a deliberate and conscious act of convention. The theory assumes the existence of what is manifestly not present in the minds of men still in the natural state, namely, an already highly developed political consciousness. "It presupposes," observes Burgess, "that the idea of the state with all its attributes is consciously present in the minds of the individuals proposing to constitute the state, and that the disposition to obey the law is already universally established. Now we know that these conditions never exist in the beginning of the political state of a people, but are attained only after the state has made several periods of its history." [1] Civil society never began by a contract between individuals or between an unorganized mass of individuals and a magistrate. The conventional element belongs to a later stage of social development. The idea of contract may, as has been said, play an important part in changing the form of an already existing state, in creating new forms of government, or in extending the state to new territories by persons already subject to political authority; but that does not explain the circumstances of the original creation of the state.

Governmental Compact does not explain the Origin of the State

The form of convention, however, which we have described as the *political* or *governmental* compact is not impossible, and, indeed, there are some historical examples of such transactions; but the theory even in this form necessarily assumes the existence of a people already organized

[1] "Political Science and Constitutional Law," vol. I, p. 62.

and capable of entering into contractual relations. Men in a state of nature cannot enter into compacts with rulers; they must first become organized, and when they have done this, they already constitute a state. The theory of the *governmental* compact, therefore, does not explain the origin of the state any more than does the theory of the *social* compact; it only explains a particular transaction in the later development of the state life or defines the nature of the relationship between the people in their politically organized capacity and their governing authorities. The theory of the social contract, says Green, implies a false notion of rights. Since those who contract must have rights, the theory implies that individuals have certain rights independently of society, which they bring with them to the transaction.[1]

Relation between the State and the Individual not contractual

The notion of covenant as the origin of political authority rests also on a false basis.[2] It would be just as logical, says Ludwig von Haller, to speak of a contract between an individual and the sun that he would allow himself to be warmed by it, or between him and the frost that he would clothe himself better.[3] It is sometimes argued, however,

[1] "Political Obligations," p. 66.

[2] Cf. Jellinek, "Recht des mod. Staates," p. 208.

[3] "Restoration of Political Science," quoted by Merriam, "History of Sovereignty," p. 65. Compare Lieber, who says, "If we mean (by the contract theory) an actual agreement at some definite time between human beings running wild, who enter after mature deliberation into a solemn covenant, and that a contract of this sort with a particular government or dynasty is binding forever, the idea is radically wrong and leads to dangerous conclusions, favoring tyranny or licentiousness." ("Political Ethics," vol. I, pp. 283–294.) "The hypothesis of the fundamental pact," observes John Austin, "is not only a fiction approaching to an impossiblity that the institution of a state or *civitas* or the formation of a society political and independent was never preceded or accompanied by an original covenant properly so-called, or by aught resembling the idea of a proper original covenant." Again he says: "If you would suppose an original covenant which as a mere hypothesis will hold good, you must suppose that the society about to be formed is composed entirely of adult members: that all these adult members are persons of sane mind, and even of much sagacity and much judgment; and fairly acquainted with political and ethical science. On these bare possibilities you may build an original covenant which shall be a coherent fiction. It is hardly necessary to add that the hypothesis of the original cove-

that although the contract theory cannot be accepted as an explanation of a historical fact, that is, as an account of the origin of some actual state in the past, it may nevertheless be received as descriptive of the proper relationship between the state and its citizens. But even in this form the theory is sound only within very narrow limits, if at all, for modern political science does not regard the relationship between the individual and the state as contractual in character. If it were, then it would follow logically that any individual would be free to become a party to the contract and hence a member of the state, or to refuse at will and thus remain in a condition of outlawry. Such a view tends to make the state a matter of individual caprice, and if the doctrine is followed out to its logical conclusion, is subversive of authority and leads to anarchy and dissolution.[1] The obligations of the citizen manifestly do not rest on a contractual basis. If so, what shall we say of the binding force of a covenant when the original contracting parties have disappeared? Does the state expire with the death of the partners, and must it be renewed by their successors, or is the original contract binding forever upon future generations who have never consented to the agreement?

The State is not a mere Partnership

The state, declared Edmund Burke, in his "Reflections on the French Revolution," "ought not to be considered as nothing better than a partnership in a trade of pepper and coffee, calico, or tobacco, or some other such low concern, to be taken up for a little temporary interest and to be dissolved by the fancy of the parties." "It is," he continues, "a partnership in a higher and more permanent sense — a partnership in all science; a partnership in all art; a

nant in any of its forms or shapes has no foundation in actual facts. There is no historical evidence that the hypothesis has ever been realized." "Jurisprudence," pp. 135, 137.

[1] Cf. Jellinek, *op. cit.*, p. 208; Bluntschli, *op. cit.*, bk. IV, ch. 9; McKechnie, *op. cit.*, p. 33; Woolsey, *op. cit.*, vol. I, p. 191; Hume, "Of the Original Compact," Works, vol. I, p. 446 ff.; Willoughby, "Nature of the State," p. 125; Lieber. "Political Ethics," vol. I, pp. 283–294.

partnership in every virtue and in all perfection. As the ends of such a partnership cannot be obtained in many generations it becomes a partnership not only between those who are living, but between those who are dead and those who are to be born." [1] The individual thus becomes a member of the state, not by admission as to a business partnership, not through voluntary adhesion to a contractual agreement; but he is born a member and becomes entitled to the rights and subject to the obligations which it creates, just as he is born into the world of nature and becomes subject to the laws of nature and to the restraints imposed upon him through the necessities of his very existence. The obligations of allegiance and obedience do not rest upon covenant or consent, but rather upon the general interests or necessities of society, or upon grounds of utility. We can no more account for them on the basis of consent than we can account for the obedience of the child to the parent on the theory of compact. These relations are independent of our consent, and we enter into them so naturally that we do not stop to inquire into their origin or causes any more than we do about the principle of gravity or the operation of the laws of nature in general.[2]

The theory of the social compact, as the basis of political authority, like the theory of divine right, was invented for a specific purpose, namely, to establish the right of resistance upon the part of subjects to sovereigns whenever the latter violated their obligations to the former. During the period of the Tudor and Stuart absolutism in England, when the rights of the people were recklessly violated by tyrannical kings, the theory was developed that as the subject owed the sovereign obedience, the sovereign in turn was bound to protect the subject and govern him justly.

[1] Cf. McKechnie, "The State and the Individual," p. 66.

[2] "If the reason be asked," said Hume, "of that obedience which we are bound to pay to government, I readily answer, because society could not otherwise exist." Essays, vol. I, p. 455.

From this the idea gradually spread that kings owed their authority to the people and could be deposed by them for abuse of that authority. In short, the relation between rulers and subjects came to be regarded as contractual in character.

Element of Truth in the Theory

If the contract theory meant no more than that the relation between rulers and subjects is one of reciprocal rights and obligations, of protection and obedience, we should be under the necessity of accepting it in its entirety. To maintain, says McKechnie, that "all men ought to have a share in molding the form of the constitution of a state is a logical and intelligible position; but to hold that the individual atoms vote the state itself into existence as the result of a unanimous plebiscite is absurd. It is to ignore the great truth established for all time by Aristotle, that man is by nature a political and social animal and therefore necessarily the member of some state, however crude."[1]

V. THE PATRIARCHAL AND MATRIARCHAL THEORIES

Expansion of the Family

"The patriarchal theory of the origin of political society," says J. F. McLennan, one of the most learned students of primitive social organization, "stated in its simplest form, represents society as the enlargement of the family, and the family as a group composed at first of a man and his wife and children."[2] With the expansion of the original family through the marriage of the children new families are founded, but the authority of the father of the first family, as chief or patriarch, is acknowledged, so long as he lives, by the whole body of descendants, however numerous. In the course of time all the families descended from the original father, if they hold together, form a very large group which we may call a tribe. Withdrawals from the tribe and removal to new territories constitute the nuclei of new tribes, and so in the course of time many new tribes

[1] "The State and the Individual," p. 67. [2] "The Patriarchal Theory," p. 1.

come into existence. Being united by ties of blood, the tribes naturally act together for common purposes, particularly in the prosecution of foreign war. In time they establish some common form of authority and thus become a state, at first necessarily simple and rudimentary. Such an example was afforded by the ancient Jewish nation, founded by the union of the twelve tribes made up of the descendants of Jacob, the original first father. In the patriarchal family the element of paternity is of course the chief fact. Blood relationship is traced only through males, and from the same ancestor; that is, kinship is purely agnatic. Furthermore, the *patria potestas* of the Roman law is the basis of all authority, that is, the father of the family controls all business, religious, and other relations of all descendants, no matter how numerous.

Maine on the Patriarchal Theory

The patriarchal theory, observes McLennan, "so simple and natural, used to be generally accepted as palpably true, like the fact of the sun moving daily round the earth. No one thought of proving it and but few of seriously doubting it." [1] Its most notable exponent and advocate in the nineteenth century was the learned Sir Henry Maine in his "Ancient Law" and in his "Early History of Institutions." In the former work Maine asserts that "the effect of the evidence derived from comparative jurisprudence is to establish that view of the primeval condition of the human race which is known as the patriarchal theory, which is defined as the theory of the origin of society in separate families, held together by the authority and protection of the eldest male descendant." [2] Regarding the genesis of society, he says: "The elementary group is the family connected by common subjection to the highest male descendant. The aggregation of families forms the *gens* or house. The aggregation of houses makes the tribe. The aggregation of tribes constitutes the commonwealth." [3]

[1] *Ibid.*, p. 3.

[2] *Ibid.*, p. 122.

[3] *Ibid.*, p. 128. According to Maine, the larger groups (*gentes*) were sometimes

More recent supporters of the patriarchal theory are the English writer Donisthorpe and the French writer Duguit. The very first state that ever existed, says Donisthorpe, was a human family, consisting of a mother and her offspring. The family, he asserts, is the earliest form of state. In course of time families are drawn together in little groups and loosely compounded under a single head, constituting the patriarchal state, in which the unit consists of the descendants of a living male who exercises power over them. The federation of patriarchal groups leads to the clan, or house, having a common name and held together by common interests. These *gentes* tend to coalesce until we have the tribe and eventually the nation, which organizes itself into a state.[1] With most people of Aryan or Semitic origin, says Duguit, the patriarchal family has been at some time the general form of social group. The male parent, by virtue of his age, sex, and ancestry, is recognized in primitive society as being invested with a particular prestige. He is the natural chief, the governor of the little state of which the members of the family are the governed. The ancient city was merely a union of families in which political power belonged to the father.[2]

held together by a suppositious rather than a real bond of kinship. In such cases the larger group was a "fictitious extension of the family." The groups bore a common name, regarded each other as descendants of a common ancestor, and were drawn together by religious ties and a sense of certain mutual rights and obligations.

[1] "Individualism, a System of Politics," p. 7. A defense of the patriarchal theory is made by Paley in his "Political and Moral Philosophy" (bk. VI, ch. 1). It is but natural, he says, that the descendants of a common progenitor should feel themselves allied to each other in a nearer degree than the rest of the species. Experiencing many inconveniences from the absence of that authority which their common ancestor exercised, especially in deciding their disputes and directing their operations in matters in which it was necessary to act in conjunction, they might be induced to supply his place by a formal choice of a successor; or rather might willingly and almost imperceptibly transfer their obedience to some one of the family who by his age or services or by the part he possessed in the direction of their affairs during the lifetime of the parent, had already taught them to respect his advice or to attend to his commands.

[2] "Droit constitutionnel," p. 39. Sidgwick expresses the opinion that primitive states are more likely an aggregate of gentes grouped into larger unions than an

Criticism of the Patriarchal Theory

In recent years historical and sociological investigation has thrown considerable doubt on the soundness of the patriarchal theory. The theory lacks historical proof to substantiate it. Among its more notable critics are McLennan, in the work already cited, Morgan, in his "Ancient Society," and Edward Jenks, in his "History of Politics." These writers reject the proposition that the family, related only through males, and ruled over by a patriarch, was universal in ancient society, or even general. There are many examples of rude societies now existing, says McLennan, in which the family differs radically from the patriarchal family, and there is much evidence to show that such families existed in early times before the patriarchal family. In other words, according to their theory the matriarchal family, founded on kinship through females, was the primary social fact. The only direct historical evidence produced in support of the former theory, they assert, is that the patriarchal family existed in early Rome; while there is evidence on the contrary to show that neither the elements of *patria potestas* nor agnation existed in the primitive Hebrew family, nor in Greece, nor among the early Germans. McLennan's theory is that the genesis of civil society goes back of the patriarchal family to the stage of polyandry and to the matriarchal family, the former of which subsequently developed into the monogamous family and the latter into the patriarchal state.[1] The same view is held by Edward Jenks, who declares that the theory that the "beginnings of society are to be found in the single household or group of descendants of a living

The Matriarchal Theory

aggregate of natural families. "We may assume," he says, "that the earlier form of political society was a comparatively small group of persons regarding themselves as kinsmen," that is, groups of persons organized on the basis of real or assumed kinship, generally the belief in a common ancestor, and it is possible that in some cases such a society may have been produced by the expansion of a single society. In any case the element of kinship, either real or feigned, was the principal tie that held together early primitive communities.

[1] "The Patriarchal Theory," pp. 27, 351, 355.

man" has been "exploded." Recent discoveries, he asserts, have proved that "the earliest social group, so far from being a small household of a single man and his wives, is a large and loosely connected group called a pack or horde, organized for matrimonial purposes on a very artificial plan, which altogether precludes the existence of a single family. In such a condition of society promiscuity of sexual relations prevails, and kinship is traced, not through the father, but through females. Likewise, Jenks asserts that the process by which families expand into clans and clans into tribes according to Maine's conception is, in fact, the reverse. The tribe is the oldest as it is the primary group; in time it breaks up into clans; these in turn break up into households and ultimately these are dissolved, leaving the individual members to constitute the units of society.[1] Examples of such societies are found among the primitive races of Australia, the Malay Archipelago, and to some extent among the early Celtic races of England and Scotland.

Conclusions

Concerning the merits of the matriarchal theory, we may say, as has been said of the patriarchal theory, that the historical proof of the universality of the matriarchal family among primitive peoples is lacking. Doubtless both theories account for the genesis of particular state organizations, though even then we must take into consideration other forces and elements which enter into the process of political organization. Our knowledge of the social institutions of primitive peoples in historic times makes it impossible to believe that either type of family prevailed universally in ancient times, or indeed that the state should have developed through the enlargement and expansion of either. The family and the state are totally different in essence,

[1] "History of Politics," chs. 1 and 2. This is also the view of Skene in his "Celtic Scotland," vol. III. Cf. also Willoughby's searching criticism in his "Nature of the State," pp. 19–30, and in his "Political Theories of the Ancient World," ch. 1; and Leacock, "Elements of Political Science," pp. 42–46.

organization, functions, and purpose, and there is little reason to suppose that one should have developed out of the other or that there should have been any connection between them.

VI. THE FORCE THEORY

The Element of Force in the State

A theory advocated by some writers is that which attributes the institution of the state to compulsion, as where a powerful individual, through sheer physical strength or preëminence of leadership, brings under his subjection people hitherto unorganized politically and imposes upon them his authority.[1] Thus Hume, in his "Original Contract," holds that the state came into existence when a tribal chieftain or other leader who had acquired great influence over his followers during war maintained his control over them after the restoration of peace. At first he may have ruled by persuasion rather than by command, until he could employ force to reduce to subjection the refractory and disobedient.[2] Manifest necessity, the theory holds, would prompt those who fought on the same side to array themselves under one leader. Having led his followers to victory, he naturally enjoyed a prestige and wielded an influence that enabled him to establish and perpetuate his control over them in civil affairs.

As an explanation of how the state originated, the force theory has few advocates to-day among political writers; yet as an explanation of the basis of state authority it is, of course, largely correct. If it meant nothing more than that force and power are the most distinctive characteristics of the state, in short, that the state, unlike all other associations of mankind, possesses the power to compel obedience from its members, no objection could be made to it. It undoubtedly possesses, as Bluntschli remarks, a "residuum of truth" in the prominence which it gives to an

[1] Cf. Bluntschli, "Allgemeine Staatslehre," bk. IV, ch. 8.

[2] Essays, vol. I, p. 445.

indispensable element in the constitution of the state (*Macht*), and he might have added it tends to correct the false impression often created by the contract theory, that political authority always rests upon the voluntary consent of those who are subject to it.

Force and compulsion have played an important part in the consolidation of states and in the erection of new state forms.[1] Some of the greatest empires of to-day have been established through "blood and iron," and it is not altogether improbable that we shall see more of blood and iron methods in the future. In this sense, as McKechnie remarks, all constitutions and governments founded on the idea of authority are really modifications of the theory of force.[2]

VII. THE HISTORICAL OR EVOLUTION THEORY

The State an Institution of Growth

We are therefore led to the conclusion that the state is neither the handiwork of God, nor the result of superior physical force, nor the creation of resolution or convention, nor a mere expansion of the family. Unlike the contrivance or agency through which it manifests itself and which we call government, the state is not a mere artificial mechanical creation, but an institution of natural growth, of historical evolution. The idea is well stated by a high authority as follows: "The proposition that the state is the product of history means that it is the gradual and continuous development of human society, out of a grossly imperfect beginning, through crude but improving forms of manifestation, towards a perfect and universal organization of mankind. It means, to go a little deeper into the psychology of the subject, that it is the gradual realization, in legal institutions, of the universal principles of human nature, and the gradual subordination of the individual side of that nature to the universal side."[3] As Burgess aptly

[1] Compare Jellinek, pp. 185–190. [2] "The State and the Individual," p. 67.
[3] Burgess, "Political Science and Constitutional Law," vol. I, p. 59.

remarks, the light of political consciousness did not dawn upon men in a state of nature all at once, and hence the decision to establish the state could not have been sudden and deliberate, as the contract theory presupposes. The idea of the state must have required a long period for its development among a people unaccustomed to political authority and unacquainted with the nature and forms of political organization. Political self-consciousness, wholly lacking at first, in time appeared in the minds of a few of the natural leaders, then it spread by degrees throughout the mass of the population and finally became general. At first the state came into existence merely as an idea, that is, it appeared in a subjective form, without being a physical fact. Before its manifestations could be felt and its ends realized it must have an objective existence in institutions and laws. In short, a constitution expressing the collective will must be created and then a magistracy must be established in accordance with the constitution. Historically, this marks the starting point for the state, but for political philosophy it is but an episode, a stage of development, in the transition from natural to civil society. "The solemn adoption by a people," says an able writer, "of such a fundamental instrument is but the act through which that which has formerly existed in a more or less undefined and vague state is brought into a definite and positive state." [1] The state exists in subjective form as soon as the common consciousness reaches that stage of development from which we may date the beginning of the movement which culminates in the formal institution of political authority. This point may in fact be reached long before the state is known and understood. The clothing of the state with the external forms of organization is not the final stage in the process, for the simple and rudimentary character which it takes in the beginning must go on developing and expanding as the political consciousness

Genesis of the State Idea

[1] Willoughby, "Nature of the State," p. 130.

spreads among the masses of the people. With advancing civilization it tends to become more complex in form, more universal in its range of activities, more indispensable to the needs of mankind. But it never attains its final and complete development.

Rightly understood, all of the best elements in the several theories discussed above enter into the historical theory. The divine element appears in the fact that the Creator has implanted in the human breast the impulse which leads to association, and in the part played by religion in bringing primitive man out of barbarism and accustoming him to law and authority. The element of compulsion exercised by those who possess natural superiority is a powerful ally of both religion and evolution in bringing the natural man into political and social relationship with his fellows. Finally, the elements of contract and consent which lie at the basis of all association play an important part in the process of establishing and reorganizing particular governments. No one of these elements alone accounts for the existence of the state, but all working together, some more prominently than others; and all, aided by the forces of history and the natural tendencies of mankind, enter into the process by which uncivilized peoples are brought out of anarchy and subjected to the authority of the state.

CHAPTER V

FORMS OF STATE AND ASSOCIATIONS OF STATES

Suggested Readings: BATBIE, "Traité de Droit public et administratif," vol. I, pp. 158–194; BLUNTSCHLI, "Allgemeine Staatslehre," bk. IV, ch. 3; bk. VI, chs. 1–7 and 24; also "Allgemeines Staatsrecht," bk. III, chs. 1 and 2, and his "Psychologische Studien über Staat und Kirche," pp. 231–291; BONFILS, "Droit international public," bk. I, ch. 1; BRIE, "Der Bundesstaat," Introduction and secs. 8–12; BURGESS, "Political Science and Constitutional Law," vol. I, bk. II, ch. 3; CALVO, "Droit international public," vol. I, bk. II; CARNAZZA-AMARI, "Traité de Droit international public," vol. I, pp. 259–321; DAHLMANN, "Politik," pp. 13–20; DESPAGNET, "Cours de Droit international public," pp. 84–178; ESMEIN, "Droit constitutionnel," Introduction; FREEMAN, "History of Federal Government," chs. 1 and 2; GAREIS, "Allgemeine Staatslehre," in MARQUARDSEN'S "Handbuch," vol. I, pp. 101–115; GUMPLOWICZ, "Allgemeines Staatsrecht," pt. II, ch. 7; HALL, "International Law," pt. I, ch. 1; HART, "Federal Government," chs. 1–5; HELD, "Staatsrecht," pp. 320–331; HUHN, "Politik," ch. 3; JELLINEK, "Recht des modernen Staates," bk. II, ch. 20; also his "Lehre von den Staatenverbindungen," LE FUR, "L'État fédéral"; LE FUR UND POSENER, "Bundesstaat und Staatenbund"; LEWIS, "Use and Abuse of Political Terms," pp. 58–67; MEYER, "Deutsches Staatsrecht," secs. 3–4, 9–12; VON MOHL, "Encyklopädie der Staatswissenschaften," secs. 40–50; OPPENHEIM, "International Law," pt. I, ch. 1; POSADO, "Tratado de Derecho Politico," bk. VII, chs. 2 and 3; PRADIER-FODÉRÉ, "Traité de Droit international public," vol. I, ch. 2; REHM, "Allgemeine Staatslehre," secs. 17–23; RIVIER, "Principes du Droit des Gens," vol. I, bk. II; SCHMIDT, "Der Staat," secs. 13–15; SCHULZE, "Deutsches Staatsrecht," vol. I, bk. I, chs. 3 and 4; SEELEY, "Introduction to Political Science," lects. II, VI, VII, VIII; TREITSCHKE, "Politik," vol. II, secs. 13–22; WAITZ, "Grundzüge der Politik," pp. 35–42; WESTERKAMP, "Staatenbund und Bundestaat," secs. 7–13; WILLOUGHBY, "The Nature of the State," ch. 10; WOOLSEY, "Political Science," vol. II, pt. III, chs. 7–8; ZACHARIA, "Vierzig Bücher vom Staate," vol. III, bks. 16–19.

I. PRINCIPLES OF CLASSIFICATION

Points of View from which States may be classified

So far as their legal nature and their fundamental purposes are concerned, all states are essentially alike and permit of little or no differentiation. In other respects, however, they possess elements of difference, like objects of nature, and may be classified from various points of view. Thus, as regards the form of their constitutions, their governmental organizations, their territorial area, the extent of their resources, the degree of influence which they exert in the political affairs of the world, etc., they present a multitudinous variety of types.[1] From the viewpoint of territorial area the types range all the way from petty principalities to vast empires embracing as much as one eighth of the earth's surface. From the standpoint of their military and naval strength and of their influence in international relations they may be classified as the "great powers" and the "lesser powers," though legally they all stand on a footing of equality.[2]

In a treatise on political science, however, classifications based on territorial area, population, resources, and similar characteristics have little value. Such classifications, for example, as agricultural, commercial, and industrial states have no more interest for the political scientist than a classification of animals on the basis of size, strength, or color has for the natural scientist.[3] For our purpose, the basis of classification must be some scientific principle, some juristic or political characteristic, which will serve to distinguish states in their essence and fundamental constitution.

[1] For an exhaustive classification of the multifarious forms of states by numerous writers see Jellinek, "Recht des mod. Staates," p. 646, n. 1.

[2] A few writers come pretty near to attributing to the "Great Powers" a legal as well as a political superiority, inasmuch as these states exercise in fact a "primacy" or "overlordship" over the smaller states — a supremacy often recognized in international conventions. See Oppenheim, "International Law," vol. I, p. 164; and Lawrence, "Principles of International Law," secs. 134–135.

[3] Compare Jellinek, p. 647.

Principles of Classification

Two such principles or bases of classification have commended themselves to writers on political science. They are: first, the form of governmental organization through which the state manifests itself; and second, the number of persons in whom the sovereign power of the state rests. Classification on the basis of forms of government has been a favorite, if not the accepted, principle among political writers; but it is open to the objection of being unscientific and, to some extent, illogical. To classify states on the basis of the nature and forms of their governments is very much like classifying railroads, for example, with respect to the organization of their boards of directors. Such a classification in its last analysis is nothing more than a classification of governments, not a classification of states. Strict logic, therefore, would seem to require an observance of the distinction between states and their governments, and a classification of each on the basis of some distinctive characteristic of its own. Much confusion and misconception have resulted from the failure to observe this important distinction. In this work, we shall, as far as possible, observe the distinction and shall consider first the forms of state.

II. MONARCHIES, ARISTOCRACIES, AND DEMOCRACIES

According to Number of Persons in whom Sovereignty resides

On the basis of the number of persons in whom the sovereign power is vested states may be classified as monarchies, aristocracies, and democracies. A monarchy is a state directed by a single supreme will;[1] an aristocracy is one in which the exercise of sovereignty resides in a comparatively small number of persons; while a democracy is one in which the exercise of sovereignty rests with the mass of the population. This was the famous classification

[1] Jellinek, "Recht des mod. Staates," p. 653; Treitschke, "Politik," vol. II, p. 53; and Meyer, "Deutsches Staatsrecht," sec. 9. A monarchy, says Pradier-Fodéré ("Principes généraux de Droit de Politique," etc., p. 242), is a state in which a single person, generally called a king or emperor, exercises sovereignty in the name of and by delegation, express or implied, of the nation.

of Aristotle and in substance it was adopted by Cicero, Polybius, and other ancient political writers.[1] In his "Politics" Aristotle, apparently without distinguishing between state and government, said: "We usually call a state which is governed by one person for the common good, a monarchy; one that is governed by more than one, but by a few only, an aristocracy. . . . When the citizens at large govern for the public good it is called a polity, which is also a common name for all other governments."[2] Aristotle further subdivided each of the above forms on the basis of the manner or motive according to which the sovereignty was exercised. Thus, according to him, there were three pure or normal forms and three corrupt or abnormal types.

Pure or Absolute Monarchy

In a pure monarchy the power of the state is completely identified with the person of the individual who is the bearer of the sovereignty; he is not sovereign one moment and subject the next; he is always the state. The old Roman maxim, *Quod principi placuit legis habet vigorem*, and the more modern French proverb, *Qui veut le roi, si veut la loi*, fully describe the attributes of a real monarch.

[1] Aristotle, "Politics," III, 7; "Ethics," VIII, 12; Cicero, "De Republica," I, 26; Polybius, "History of Rome," VI, 3.

[2] Willoughby, "Political Theories of the Ancient World," p. 171. Schulze, Treitschke, and Meyer, well-known German scholars, regard aristocracies and democracies as special forms of a republic. There is no fundamental difference between an aristocracy and a democracy, they maintain, the only distinction being one of degree. Schulze, "Deutsches Staatsrecht," vol. I, p. 32; Treitschke, "Politik," vol. II, pp. 5 ff. Treitschke maintains that the difference between a monarchy and a republic is this: a monarchy is a form of state in which a single individual rules *as of right;* a republic is one in which one or more individuals rule, not as of right, but in virtue of *delegated power*. The test is not, he says, whether one or more are vested with the sovereign power, but whether the power is exercised of right or by delegation. Somewhat the same view is held by Jellinek, who maintains that all non-monarchical states are in reality republics, the distinction being merely quantitative rather than qualitative. Aristocracies, oligarchies, democracies, and timocracies should in strict logic, therefore, be grouped under the head of republics. In this case we should have aristocratic republics, oligarchic republics, democratic republics, etc. "Recht des mod. Staates," p. 694.

In strictness there can be no such thing as a limited monarchical state, for all states are legally absolute and unlimited. There may, however, be limited monarchical governments. The so-called limited monarchical state is in fact a democratic or aristocratic state having a constitutional government in which the executive power is vested in a monarch.

Criticism of Aristotelian Classification

The Aristotelian classification has been criticised on several grounds. In the first place, the classification, it is said, does not rest on any organic fundamental principle, but upon mere numbers and hence is mechanical rather than spiritual, quantitative rather than qualitative in character.[1] The answer which has been made to this criticism is that the number of ruling persons may indicate the degree to which political self-consciousness has spread among the population and hence the capacity of the people for self-government.[2] Professor Seeley criticised Aristotle's classification on the ground that it was scarcely applicable to the states with which we have to deal to-day. In view of the "marvelous difference" between the "country states" of the present and the city states of Aristotle's day, said Seeley, they cannot be placed in the same class.[3]

[1] This is the criticism, for example, of Von Mohl in his "Encyklopädie der Staatswissenschaften," p. 111.

[2] Compare Burgess, "Political Science and Constitutional Law," vol. I, p. 73. The German writer Schleiermacher, in his "Idea of the Different Forms of State" ("Über die Begriffe der verschiedenen Staatsformen"), published in 1814, recognized the value of this principle in his attempt to classify states on the basis of the different stages in the development of the political consciousness of the people. If this consciousness was widely diffused among the masses of the people, then the state was a democracy; if it had taken possession only of a minority of the population, it was an aristocracy, and so on. A somewhat similar principle lay at the basis of Röhmer's classification, which was based on the four stages of party development. See his "Lehre von den politischen Parteien," sec. 219 ff.

[3] "Introduction to Political Science," lect. II. For further criticism see Bluntschli, "Psychologische Studien über Staat und Kirche," pp. 234–242; Sidgwick, "Elements of Politics," ch. 30; Lewis, "Use and Abuse of Political Terms," *sub verbo* "Monarchy"; Willoughby, "Nature of the State," pp. 362 ff.; and Dunning, "Politics of Aristotle," in the "Political Science Quarterly," vol. XV.

In essence, however, the states of antiquity were not different from those of to-day, though of course there was a wide difference in the form and character of their governments. Again, it is objected that since there are practically no civilized states to-day in which actual sovereignty, political as well as legal, is reposed in a single person or a small class, the classification of states on the basis of the location of sovereignty is practically worthless. Furthermore, the attempt to distinguish between aristocracies and democracies must inevitably lead to hair-splitting, since there is no fixed criterion for determining where the one ends and the other begins. Moreover, a practical difficulty is encountered when we attempt to apply such a principle of classification to a state like Great Britain, where the legal sovereignty is in the legislature, and the political sovereignty is in the electorate. On the former basis England would have to be classed as an aristocratic state; on the latter as a democratic state, though it is officially and popularly styled a monarchy. But if the Aristotelian classification be confined to its original meaning, the objections will not appear so well founded as they seem. Most of the confusion has arisen from the failure to discriminate between forms of state and forms of government, and from the practice of treating as monarchies all states that have hereditary executives, however democratic they may be otherwise. Such usage puts into the same class states as widely different as Great Britain and Turkey, and in different classes those so nearly alike as Great Britain and the United States. If rightly applied, the Aristotelian principle will not produce any such absurd classifications.

III. THEOCRACIES

The Pure and the Limited Theocracy

The so-called theocratic state is one in which the ultimate sovereignty is attributed to some superhuman or spiritual being. German writers on the state generally distinguish

between two types of theocracy, the *pure* form and the *dualistic* or *limited* form. The pure theocracy is one in which the supernatural person to whom the sovereignty is attributed is alleged to rule directly and immediately without the aid of human intermediaries. The limited or dualistic theocracy is described as one in which the immediate ruler is not God, but a human king who rules as his vicegerent and acts as the interpreter of the divine will, which is made known to him by revelation. He is guided and directed by God, to whom alone he is responsible. In the dualistic theocracy there is a separation between religious and civil affairs, each being administered by different authorities. The pure theocracy belongs to the most primitive stage of society; the dualistic type to a later, though still somewhat undeveloped, stage.

Bluntschli gives as examples of pure theocracies Ethiopia, ancient Egypt, Persia, and the kingdom of the Jews.[1] To this list Von Mohl adds ancient Mexico and Peru.[2] The Mohammedan states of the Middle Ages were also largely theocratic in character. Mohammed considered himself the vicegerent of God, and the Koran contained the law and jurisprudence by which his people were governed. The caliph was both emperor and pope, and religious and temporal affairs were not clearly differentiated from one another. Other states of Europe until comparatively recent times possessed theocratic elements; and, as is well known, some of the early communities of North America were founded on a religious basis.[3]

[1] "Allgemeine Staatslehre," vol. I, bk. VI, ch. 6. For further accounts of the theocratic state see Von Mohl, "Encyklopädie," pp. 104–105, 113 ff.; Jellinek, "Recht des mod. Staates," pp. 180 ff.; Duguit, "Droit constitutionnel," pp. 21–25; Waitz, "Grundzüge der Politik," pp. 36–42; Willoughby, "Nature of the State," pp. 42–53; Woolsey, "Political Science," vol. I, pp. 196–198, 497–500; Batbie, "Traité de Droit public et administratif," vol. I, ch. 43.

[2] "Encyklopädie," p. 319.

[3] Such was the New Haven colony, where membership in the body politic was restricted to church members "whose lives successfully bore the test of the most rigid scrutiny." The church was the "cornerstone of the political edifice," and the

Influence of Theocratic Elements in Early Societies

The so-called theocracy was one of the most common forms of primitive state organization and was well adapted to the infancy of political communities, since religion is the most powerful agency for organizing and fixing to the soil wandering, barbaric tribes, inculcating in them respect for authority and placing them in a position of receptivity for civilization. It was religious influences that led the Teutons along the path of civilization and brought them under the yoke of law, that lay behind the political organization of western Europe by the Carolingians, that promoted the organization of the scattered tribes of Russia into a state; and it is to-day very largely the power which secures the attachment and loyalty of the masses to the Russian throne. In the same way it was Mohammedanism that wrought the feeble states of Islam into a mighty state organization, which founded populous cities and overthrew empires. It would be easy to show that the English state had its roots in the church. For a long time the alliance between church and state was the main support of the state; indeed down to the reign of Anne, says Seeley, the English church was the English state in a certain sense. For many centuries the church continued to exercise a wide degree of civil jurisdiction, and churchmen enjoyed equal authority with the officials of the state in the performance

Holy Scriptures became the code for the government of the community through the adoption of a resolution "that the worde of God shall be the onely rule to be attended unto in ordering the affayres of government in this plantation." Osgood, "The American Colonies in the Seventeenth Century," vol. I, p. 323. To a less extent the colonies of Massachusetts and Plymouth had at first a theocratic character. Calvin's "Institutes of the Christian Religion" was the chief political as well as the chief religious text-book of the Puritans. Their politics were largely colored by its teachings, and there existed an organic connection between church and state. It was the duty of the church, says Osgood (*ibid.*, pp. 201–202), to create a perfect Christian society and the duty of the state to furnish the necessary external conditions. They accepted Calvin's doctrine that lawful magistrates are divinely commissioned and their work a part of the plan of Providence, and that it is the duty of the state to punish idolatry, blasphemy, and other offenses against religion. In the Southern colonies the clergy exerted a less powerful influence in public affairs.

of the various secular functions.[1] But as time passed the state everywhere tended to become more and more secularized, came to lean less upon the support of the church, and finally was able to support itself without religious props.[2]

"Theocracies and despotisms," observes an able writer, "have their place in the historical development of the state; and their work is as indispensable in the production of political civilization as is that of any other form of organization. We have not done with them yet, either. The need of them repeats itself wherever and whenever a population is to be dragged out of barbarism up to the lowest plane of civilization." [3] Juridically, however, the theocracy is not a distinct form of state, but is either a form of monarchy or aristocracy.[4] The sovereignty may be imputed to God or some other extramundane power, but the fact remains that whoever, whether priest or prophet, in the final analysis, interprets the will of this supernatural authority and enforces its commands, is, so far as political science and constitutional law are concerned, the actual legal sovereign. Ultimately God may be the ruler and source of authority, but his power must be humanly interpreted, made known, and immediately exercised through human agencies. The so-called theocratic state must, therefore, according to the basis of classification which we have laid down as the correct one, be either a monarchy or an aristocracy.

[1] In England down to 1857 the ecclesiastical courts had jurisdiction of such matters as marriage and divorce, wills, the care of minors and orphans, etc.

[2] Cf. Seeley, "Introduction to Political Science," lect. II.

[3] Burgess, "Political Science and Constitutional Law," vol. I, pp. 60–61.

[4] Bluntschli, however, maintains that the theocracy is neither a form of monarchy, aristocracy, nor democracy, but that it belongs to another fundamental type which he designates as *Ideokratie*. In a theocracy, says Bluntschli, the real rulers are men conceived of as spiritual beings rather than as human personalities. "Psychologische Studien über Staat und Kirche," p. 238. See also Von Mohl, "Encyklopädie der Staatswissenschaften," p. 104; and Leo, "Naturlehre des Staates."

IV. OTHER CLASSIFICATIONS

Many attempts have been made by later writers to improve on Aristotle's classification.

Thus, Machiavelli and Montesquieu classified states as monarchies and republics, and this classification has been followed by a number of recent scholars.[1] The German scholar Waitz classified states as republics, theocracies, kingdoms, unitary states, composite or compound states (*Gesammtestaaten*), federal states, and confederations.[2] Von Haller classified them as principalities and free communities, the latter being subdivided into patrimonial states, priestly states, and military states. Gareis, a more recent German writer on political science, recognizes two general types of state: the unitary state (*Einheitsstaat*) and the composite state (*Staatenstaat*). The first is the simplest form of state, though it may be divided for convenience of administration into provinces, districts, etc., having little or no local autonomy. The composite state is one composed of communities which themselves have certain of the characteristics of states. Composite states, says Gareis, are of three kinds: real unions, federal unions, and confederations.[3] This classification is followed by many writers, especially those on international law. Pradier-Fodéré, a noted French publicist, classified states as separate or independent and as united. The first class he subdivided into (*a*) personal unions, (*b*) real unions, (*c*) incorporate unions. The second group

[1] Notably by Schulze, Treitschke, Georg Meyer, Sir George Cornwall Lewis, and Frederick Martens. Treitschke also enumerates the *Culturstaat* among the forms of state. "Politik," vol. I, p. 81. Bluntschli considers Montesquieu's classification to be a distinct improvement upon that of Aristotle, for the reason that it is not based merely on numbers but on a spiritual or moral principle, namely, virtue and moderation. *Op. cit.*, bk. VI, ch. 4.

[2] "Grundzüge der Politik," pp. 36–42.

[3] "Allgemeine Staatslehre," in Marquardsen's "Handbuch des öffentlichen Rechts," vol. I, sec. 38.

he subdivided into (*a*) confederate states and (*b*) federal states.[1]

Von Mohl's Classification

One of the most distinguished German writers, Robert von Mohl, in his "Encyclopedia of the Political Sciences," written about the middle of the nineteenth century, attempted a most elaborate classification of states, though without reference to any single consistent principle or criterion. His classification was as follows: first, patriarchal states; second, theocracies, or those which have a religious purpose and which are under the guidance and direction of a supernatural power; third, patrimonial states;[2] fourth, classic or antique states, such as those of early Greece and Rome; fifth, legal states (*Rechtsstaaten*), or those whose sphere of action is determined by law and whose activites are regulated by legal norms;[3] and sixth, despotic states, or those which are ruled without regard to the prescriptions of law. Von Mohl recognized also a form which he called the military vassal state, and he subdivided classic states into monarchies, aristocracies, and democracies.[4] An examination of Von Mohl's classification will show, as has been said, that it is based upon no single logical or scientific

[1] "Traité de Droit international public," vol. I, p. 215. Ch. 2 of this work contains a good discussion of the forms of state.

[2] A patrimonial state is one in which not only the political sovereignty but also the ownership of the land embraced within the territorial limits of the state is attributed to the ruler. That is, the king not only exercises sovereignty over the land, but dominion also; he is not only ruler, but proprietor. The idea of such a relation is frequently referred to in the literature of antiquity; it occupied an important place in early Germanic law, and in a sense was the basis of the feudal system. The patrimonial state was recognized by the early writers on international law, Grotius, Pufendorf, Wolf, and others. See Jellinek, *op. cit.*, s. 192–194; also Merriam, "History of Sovereignty," ch. 4.

[3] The *Rechtsstaat* is a form of state concerning which the German writers have written much. See, *e.g.*, Gneist, "Der Rechtsstaat," especially ch. 4. Gneist defines the *Rechtsstaat* as the "*Organismus welcher der zerfahrenen Lehre der heutigen Gesellschaft die Grundlage der bürgerlichen Freiheit zu geben vermag*"; Bahr, "Der Rechtsstaat," secs. 4–5; Maurus, "Der moderne Verfassungsstaat als Rechsstaat," especially pp. 59–110; Gumplowicz, "Rechtsstaat und Socialismus."

[4] "Encyklopädie der Staatswissenschaften," secs. 15, 43, 44, 47, 48, 50.

principle. Some of the forms which he enumerates overlap one another, while others are wholly inapplicable to the states of the present day. Thus, the patriarchal state is at the same time a monarchy and so is the theocracy, the despotism, and the patrimonial state. Moreover, all states are despotic in the purely legal sense, and all states are legal states in the sense that they are the source of law and govern according to the prescriptions of law. To classify states as "classic" or antique is about as logical and scientific as to classify them as "territorial" states, "human" states, "medieval" states, "modern" states, etc. Such terms do not belong properly to the nomenclature of political science, but to that of literature and history, and hence such classifications have little or no scientific or practical value.[1]

Bluntschli's Classification

Bluntschli conceived the "fundamental" forms of state to be four in number: monarchy, aristocracy, democracy, and ideocracy or theocracy, the last in its perverted form being styled by him an idolocracy.[2] In addition, he recognized a group of "secondary" forms which he considered necessary to complete the Aristotelian classification, namely, free, half-free, and unfree states. Theocracies, he said, tend to become unfree states; aristocracies "gravitate" toward the half-free class; while democracies naturally belong to the free type, although they may become despotisms.[3] Furthermore, he added confusion by attempting to classify states as civilized monarchies, patriarchal kingships, feudal monarchies, military and judicial principalities, absolute, limited, and constitutional monarchies, compound states, mixed states, and various others.

The So-called Mixed State

Some writers have recognized the existence of a mixed state made up of a combination of monarchical, aristo-

[1] Compare Burgess, "Political Science and Constitutional Law," vol. I, pp. 73–74.

[2] "Allgemeine Staatslehre," bk. VI, ch. 4; see also his essay entitled "Die Staatsformen" in his "Psychologische Studien über Staat und Kirche."

[3] "Allgemeine Staatslehre," ch. 5.

cratic, and democratic elements. Aristotle himself seems to have considered the ideal polity to be a "mixture" of oligarchy and democracy.[1] Rome was cited by both Cicero and Polybius as an example of the mixed type, being composed of monarchic, aristocratic, and democratic elements, and Cicero considered the best state to be the mixed form.[2] Blackstone and Rousseau are sometimes cited as recognizing the mixed form, but it is clear from an examination of their classifications that they were thinking of forms of government rather than of forms of state. Bluntschli defined a mixed state as "one in which monarchy, aristocracy, or democracy is moderated or limited by other political factors," as, for example, a monarchy which is limited by an aristocratic senate or by the people acting through a primary or a representative body.[3] But obviously such a combination is nothing more than a form of government, not a form of state. Bluntschli indeed admitted that such a "mixture does not create a new form of state, for the sovereignty is still in the monarch, the aristocracy, or the people." The truth is, there can be no such thing as a mixed state. The state is a unity; its attributes are incapable of combination and intermixture. A monarch and an aristocratic body cannot both be sovereign at the same time, and hence the state cannot be a monarchy and an aristocracy at the same time any more than a number can be at once singular and plural.[4]

[1] "Politics," bk. IV, ch. 8; cf. Willoughby, "Political Theories of the Ancient World," p. 180.

[2] "De Republica," I, 23.

[3] *Op. cit.*, bk. VI, ch. 2.

[4] Great Britain is sometimes cited as a good example of a mixed state, but manifestly it is not the state that is mixed. It has a government composed of monarchical, aristocratic, and democratic elements, but the state is a unity and the sovereignty is undivided. On "mixed governments" see De Parieu, "Principes de Politique," ch. 5; and De Tocqueville, "Democracy in America," ch. 15. De Parieu reviews the subject historically and points out the "mixed" elements in various governments.

V. SIMPLE AND COMPOSITE STATES; PERSONAL AND REAL UNIONS [1]

Many writers, as has been said, classify states as simple and composite.[2] A simple state is one which has a single supreme government and exerts a single will, whether it be that of an individual or an assembly. It may for convenience of administration be subdivided into provinces, departments, communes, counties, etc.; or it may possess non-contiguous territories, such as colonies and dependencies; or it may even include territorial divisions that were formerly independent states, like Ireland and Scotland. But so long as the subdivisions are legally nothing but historical or administrative circumscriptions without an extensive local autonomy as of right, the state is simple in form. Such a Commonwealth is sometimes described as a unitary state (the *Einheitsstaat* of the Germans) because the governmental organization is a unit rather than dualistic or federal in character. The administrative districts into which such a state is divided possess neither the name, the traditions, nor the characteristics of states, and whatever powers of government they exercise or whatever rights of autonomy they possess are delegated to them by the central government, and may be modified or withdrawn at its pleasure. The empires and kingdoms of Europe (Germany excepted) with their vast outlying possessions, to which are delegated important powers of local government, are nothing but unitary states, because the local governmental organizations are the creations of one central power, which determines their competence and to which in the last analysis they are completely subject.[3]

[1] The terms "simple" and "composite" are in strictness descriptive of forms of government rather than forms of state, but the above classification is observed and the subject is treated in this chapter rather than in the next, in deference to popular usage.

[2] Martens adds a third class, united states (*états-unis*). "Traité de Droit international," vol. I, p. 311.

[3] Some writers, like Heffter ("Völkerrecht," sec. 20), consider Great Britain with

Personal Unions

Where two or more states, wholly separate and distinct in their external and internal relations, are associated together under the same reigning sovereign, we have what is called a personal union.[1] The only bond of connection is the crown. Each of the associated states is entirely independent of the other; each has its own constitution and laws, its own distinct political organization, and its own citizenship and local institutions. The acts of their common sovereign in relation to each of the member states have no application within the territories of the other nor any binding effect upon its citizens. Indeed the subjects or citizens of the one are foreigners to the other. Though physically the same person, the sovereign possesses two distinct legal personalities and may enjoy widely different powers and attributes in the different states composing the union. He may be an absolute ruler in one and a constitutional ruler in the other. In international as well as internal relations each constitutes a distinct and separate personality, so much so that one might make war upon the other without affecting the union, or declare war against a third power without involving the belligerency of its associate. The distinguishing characteristic of a personal union, says

its great and largely autonomous self-governing colonies as a composite state rather than a simple state, but the weight of the opinion and reason are against such a view. On the nature of the unitary state see Gareis, "Allgemeine Staatslehre" in Marquardsen's "Handbuch," pp. 100–104; Meyer, "Deutsches Staatsrecht," pp. 11 ff.; and Nys, "Le Droit international," vol. I, pp. 367–368.

[1] Despagnet, "Cours de Droit int. pub.," pp. 88–89; Nys, "Le Droit int.," vol. I, pp. 377–378; Rivier, "Principes du Droit des Gens," vol. I, pp. 93–97; Hall, "International Law," sec. 4; Moore, "Digest of International Law," vol. I, sec. 7; Oppenheim, "International Law," vol. I, sec. 86; Bonfils, "Droit international public," ed. by Fauchille, pp. 87–88; Calvo, "Droit international," vol. I, secs. 45–48; Pradier-Fodéré, "Traité de Droit international public," vol. I, pp. 201–202; Klüber, "Droit des Gens," sec. 27; Juraschek, "Personal- und Realunion"; Martens, "Traité de Droit international," vol. I, sec. 58. Some writers classify the personal union as a form of composite state, but there is no justification for such a classification, since such a union constitutes no new state but represents only a condition in which two or more states employ a common agent for certain purposes. Martens classifies it under the head of united states (*états-unis*), which is more defensible. *Op. cit.*, sec. 58.

Hall, is that states employ for the time being the same agent for a particular class of purposes; but they are in no way bound by or responsible for each other's acts. Such a condition may result from treaty stipulation or, as is more commonly the case, from the operation of identical succession laws which fix the crown upon the same dynasty. In the latter case the union necessarily ceases with the extinction of the dynasty, each state then being free to choose a different sovereign. It may also happen that the reigning sovereign of one state is formally chosen by another state to rule over it, in which case the union ceases with the death of the common ruler unless it is renewed by the joint election of a successor. Likewise, if the ruling prince is overthrown by revolution in one state, and the succession thereby changed, the union is necessarily terminated. It may also be terminated where the law of succession is different, as, for example, where a woman should come to the throne in one of the states, but would be ineligible in the other.

Examples of Personal Unions

Examples of personal unions were the union between Spain and the old German Empire under Charles V, 1520–1556; between England and Hanover from 1714 to 1837, terminated by the accession of Victoria as Queen of England, the laws of succession in Hanover not permitting females to succeed; between Holland and Luxembourg, 1815–1890; between Schleswig-Holstein and Denmark, 1776–1863; and finally, the general act of the Berlin Conference of 1885, followed by a Belgian law of the same year, which declared that the relation between the king of the Belgians and the Congo state should be exclusively personal in character.[1]

[1] Rivier, *op. cit.*, vol. I, pp. 94–95. This relation has been somewhat modified by recent acts (see Bonfils, *op. cit.*, p. 88). The king of Prussia until 1848 was sovereign of the principality of Neufchatel, then a member of the Swiss Confederation (see Pradier-Fodéré, *op. cit.*, vol. I, p. 202). Bonfils asserts that the connection between England and India since 1877, when Victoria was proclaimed Empress of India, has been that of a personal union. Wheaton adds Norway and Sweden (after

The so-called composite state is one composed of two or more states or of communities which have a wide autonomy as of right, and which often possess the name and always some of the characteristics of states. Pradier-Fodéré describes it as a union of a "certain number of states which have internally independent governments though not individually sovereign."[1] It differs from the simple state in that it is itself constructed out of states, or at least out of communities which were once states and which are still organized like states and retain a limited international capacity. The degree of sovereignty or local autonomy, as the case may be, which the component members retain, as well as the character of the international person which they collectively constitute, depends upon the nature of the act by which the union has been created. Composite states are usually classified as real unions, confederations, and federal unions and, some writers add, states maintaining protectorates and suzerainties.

The Composite State

A "real union" results from the joining together of two or more states, not merely through the employment of a common ruler, but through the creation of common constitutional or international arrangements for the administration of certain common affairs. Such a union occurs, says Hall, when states are indissolubly combined under the same monarch, their identity being merged in that of a common state for external purposes, though each may retain distinct internal laws and institutions.[2] It differs

Real Unions

1814) to the list of personal unions ("Elements of International Law," ed. by Lawrence, p. 72), but obviously he did not understand the true relation between the two.

[1] "Traité de Droit international public," vol. I, p. 207. Compare also Bonfils, "Droit international public" (ed. by Fauchille), pp. 86–87.

[2] "International Law," p. 28. Brie defines a "real union" as a "*Verein von Staaten mit rechtlicher Gemeinsamkeit der Person des Staates oberhaupts und zwar des monarchischen Staats überhaupts.*" "Theorie der Staatenverbindungen," p. 69. See also Martens, *op. cit.*, vol. I, p. 323; Moore, "Digest of International Law," vol. I, sec. 9; Rivier, *op. cit.*, vol. I, pp. 97 ff.; Le Fur und Posener, "Bundesstaat und Staatenbund," sec. 73; Pradier-Fodéré, *op. cit.*, vol. I, pp. 202–204; Calvo,

from the personal union in that the associated states or component members are organically united by constitutional bonds and have common organs of government and a single international personality for most purposes.[1] It also possesses greater elements of permanence, its existence being unaffected by the death of the common sovereign or the extinction of the reigning dynasty.[2]

Examples of Real Unions — Austria-Hungary

The most notable example of a real union to-day is that between Austria and Hungary. The union between the kingdoms of Norway and Sweden from 1815 to 1905 was also an example. The former rests upon constitutional compact, the act of union being embodied in a pair of identical statutes adopted by the parliaments of the two states in 1867. They not only have the same ruling sovereign (who, it may be observed, enjoys different titles and dignities in the two states and is crowned separately in each), but a common legislative body for limited purposes, a common army organized on the same basis and commanded in a common language, a common diplomatic service, a common court of accounts, a common tariff and trade union, and common ministries of war, finance, and foreign affairs. The expense of the joint administration is borne by the two states according to a proportion agreed upon by them. In international intercourse the union

secs. 45–48; Schulze, "Lehrbuch des deutschen Staatsrechts," vol. I, pp. 43, 44; Bonfils, *op. cit.*, pp. 88–90; Gareis, "Allgemeine Staatslehre," in Marquardsen's "Handbuch," vol. I, pp. 105–106; Despagnet, "Cours de Droit int. pub.," p. 89; Nys, "Le Droit international," vol. I, pp. 368–370; and Carnazza-Amari, "Traité de Droit int. pub.," vol. I, pp. 269–270.

[1] Juraschek, "Personal- und Realunion," p. 95.

[2] Jellinek considers the "real union" to be a special form of confederation (*Staatenbund*) which results from the legal union of two or more independent states for common protection under one and the same physical personality, who acts as the common bearer of the power of the component members, though each retains its sovereignty. "Die Lehre von den Staatenverbindungen," p. 215. A. B. Hart ("Federal Government," pp. 14–15) groups "personal" and "real" unions together with the so-called "incorporate" union under the head of "conjunctive" unions, since the distinguishing characteristic of all such formations is that they employ conjointly the same sovereign.

represents a single personality, though for most purposes of internal administration each state retains its own sovereignty and independence.[1]

Norway and Sweden

The terms of the agreement by which Norway and Sweden were joined were embodied in a treaty of August 6, 1815. According to the agreement Norway recognized the king of Sweden as its sovereign and representative in international relations, though the constitution of Norway expressly declared that Norway should remain a "free, independent, and indivisible empire." The treaty of union regulated the procedure to be followed in both kingdoms for the election of the successor of their common sovereign. The two states maintained a common diplomatic and consular service, though, unlike the Austro-Hungarian arrangement, their foreign relations were not conducted through the agency of a common Norwegian-Swedish ministry, but through the Swedish foreign minister, who managed the external affairs of both states.[2] The two

[1] Cf. Lowell, "Government and Parties on the Continent of Europe," vol. II, ch. 9; Le Fur und Posener, "Bundesstaat und Staatenbund," sec. 73; Kallesburg ("Der monarchische Bundesstaat Österreich-Ungarn," 1880) considers the Austro-Hungarian union to be a federal state; Bidermann ("Die rechtliche Natur der Österreichische Ungarische Monarchie," 1877) characterizes it as a personal union. Some of the Hungarian publicists consider the relation little more than personal. Compare an article by Count Albert Apponyi in the "North American Review" for May, 1905. The relation between Hungary and Croatia is treated by some writers as that of a personal union (*e.g.*, Ulbrich, "Die rechtliche Natur der Österreichischungarischen Monarchie," 1899, and Brie, "Theorie der Staatenverbindungen," p. 70); others, like Bidermann, consider it a federal union. Le Fur and Posener ("Bundesstaat und Staatenbund," p. 303) take the latter view. See also Rivier, *op. cit.*, vol. I, p. 98; and Jellinek, "Staatenverbindungen," pp. 234 ff.

[2] While the two states had a common foreign policy, each retained its separateness and individuality in the family of nations and each sometimes concluded separate though identical treaties with foreign states. Thus the United States had identical extradition conventions, bearing different dates, with each state, though they were entered into with the king of Sweden and Norway. The obligation to deliver up fugitives from justice in each case rested, not on the common government, but upon the particular government concerned. "Treaties of the United States now in Force," 1899, pp. 486–471 and 621–625; Moore, "Digest," sec. 9. On the legal nature of the union between Norway and Sweden see Jellinek, "Staatenverbindungen," pp. 223–234.

states had different commercial and naval flags and distinct systems of internal administration; and each had its own army under the command and direction of the joint king. Unlike the Austro-Hungarian union, there was nothing in the nature of a common legislative assembly, nor were there any joint ministries of state. Matters of common interest, which could not be regulated by the joint king, were dealt with by the concurrent action of the parliaments of the two kingdoms. The joint arrangements were indeed so few and unimportant that some writers have treated the relation as simply that of a personal union,[1] though this is incorrect, since the perpetuity of the union did not depend upon any dynasty or law of succession. The increasing dissatisfaction of Norway and its desire for a real joint ministry of foreign affairs and a separate consular system led to the disruption of the union in 1905 by the secession of Norway and the conclusion between the two states of a treaty of permanent separation.

VI. CONFEDERATIONS

"A confederation," says Hall, "is a union strictly of independent states which consent to forego permanently a part of their liberty of action for certain specific objects, and they are not so combined under a common government that the latter appears to their exclusion as the international entity."[2] It is a permanent association of states for the joint

[1] Notably Wheaton, Funck-Brentano and Sorel, and Phillimore. Others, like Sir Travers Twiss, regard it as a federal pact.

[2] "International Law," p. 28. Compare also Pradier-Fodéré, who conceives a confederation to be "an association of sovereign and independent states which do not recognize a superior and common authority, each state retaining its own sovereignty, the right to govern itself according to its own laws, there being no common executive power with a right to impose its decrees upon the citizens of the member states or to come into direct relations with them." "Traité de Droit int. pub.," vol. I, p. 204. Jellinek defines a Confederation as a permanent political league (*Bundniss*) having a permanent central organ whose purpose is at least the common defense. "Staatenverbindungen," p. 172. Brie describes it as "*ein aus Staaten*

exercise of their rights of sovereignty for the common advantage. It differs from a mere alliance in having a fixed central organ for ascertaining and giving effect to the wills of the component states,[1] in the greater variety of its objects, and in the intent of perpetuity. But, says Austin, a system of confederated states and a number of independent states connected by an ordinary alliance cannot be distinguished precisely through general or abstract expression. The former is intended to be permanent, the latter temporary; while the ends or purposes embraced by the compact are commonly more numerous and more complicated than in the case of the temporary alliance.[2]

A Confederation is a League of States

Though popularly treated as a form of state, a confederation is in fact no state, but a league or a band of states (*Staatenbund*) rather than a "banded state" (*Bundesstaat*).[3] The component members of a confederation retain their internal sovereignty, dignity, and political organizations and, to a greater or less extent, their external sovereignty. They are therefore real states, not mere administrative circumscriptions with a limited local autonomy, and

zusammengesetztes föderatives Gemeinwesen." "Theorie der Staatenverbindungen," pp. 83–95. For further literature on confederations see Rivier, vol. I, sec. 6; Gareis, in Marquardsen's "Handbuch," vol. I, pp. 114–115; Jellinek, "Staatenverbindungen," pp. 172–194; Brie, "Staatenverbindungen," pp. 83–95; Bornhak, "Allgemeine Staatslehre," pp. 225–236; Westerkamp, "Staatenbund und Bundesstaat"; Freeman, "History of Federal Government," chs. 1 and 2; Hart, "Introduction to Federal Government," chs. 1–4; Moore, "Digest of International Law," sec. 10; Oppenheim, "International Law," vol. I, pp. 128–129; Wheaton, "Elements of International Law," ch. 1; Le Fur und Posener, "Bundesstaat und Staatenbund"; Bonfils, "Droit international public," pp. 90–91; Borel, "Étude sur la souveraineté et l'État fédératif"; Calvo, *op. cit.*, vol. I, pp. 179–196; Meyer, "Deutsches Staatsrecht," sec. 13; Treitschke, "Politik," vol. II, sec. 21; Nys, *op. cit.*, pp. 371–377; Despagnet, *op. cit.*, pp. 135–136; Carnazza-Amari, *op. cit.*, vol. I, pp. 276–287; "The Federalist," No. 39.

[1] Wheaton, however, maintains that a confederation differs in no essential particular from an ordinary alliance. "Elements," p. 75 (ed. by Lawrence).

[2] "Province of Jurisprudence Determined," ed. of 1861, pp. 223–224.

[3] "*Der Staatenbund*," says Brie, "*ist demnach ein Geimenwesen; aber er ist kein Staatswesen.*" "Staatenverbindungen," p. 88. Cf. also Duguit, "Droit constitutionnel," p. 141; Jellinek, "Staatenverbindungen," p. 178.

their relations to one another are of an international character.[1] There is no single sovereignty, but as many sovereignties as there are states composing the confederation. Confederations rest on compact or articles of agreement rather than upon constitutional law. They have only a limited juristic personality and then mainly in international relations. They have as such no citizens or subjects to whom their commands can be directly addressed, or from whom obligations or duties may be required. Being composed of sovereign states, their governmental organizations rarely operate directly upon individuals, but reach them only through the medium of the state organizations.[2] The will of the confederation is but the sum total of the wills of the component states,[3] and is expressed, not in statutes framed by a real legislative body, but in ordinances or resolutions framed by a quasi-diplomatic body consisting of plenipotentiaries representing the governments of the several states composing the confederation.[4] These plenipotentiaries usually vote by states and according to the instructions of the governments which they represent.

The Organization of a Confederation

Their resolutions have no binding effect upon individuals as such, but are addressed, as already said, to the organizations of the component states, and are usually inoperative until adopted by their governments and given the force of law within their jurisdictions. The congress or diet of a confederation has no power to enforce its resolutions except by "federal execution," that is, by the use of force against a recalcitrant member. Most of the confederations in the past have in fact had no executive or judicial machinery, and have therefore been compelled to rely upon the good faith of the member states to enforce their commands.

[1] This is sometimes expressly declared, as, for example, in the articles of union of the American Confederation, 1781–1789.

[2] Cf. Rivier, *op. cit.*, vol. I, p. 102; Pradier-Fodéré, *op. cit.*, vol. I, p. 207.

[3] Jellinek, "Staatenverbindungen," p. 176.

[4] Cf. Brie, "Theorie der Staatenverbindungen," p. 91.

Usually the component members are free to withdraw at will and thus dissolve the confederation, and the confederate authorities have no constitutional power to restrain a disaffected member and compel it to remain in the confederation against its will.[1]

Examples of Confederations

History abounds in examples of confederations, for the tendency of neighboring states to associate themselves together for purposes of defense and for the furthering of their common interests has proved to be almost as strong as the social impulse among individuals. Among the ancient Greeks, confederations were numerous, the more important being the Bœotian, Delian, Lykian, Achæan, and Ætolian leagues. In some cases the component members were federated together much more closely than in others. The constitution of the Achæan League, for instance, provided for a common executive magistracy, a legislative body, and even a rudimentary judiciary.[2] Its organization was, in fact, so highly developed that it is considered by some writers to have been essentially a federal union rather than a confederation.[3] Leagues and confederations among the early Italian cities were not uncommon, though they never attained the perfection and degree of importance

[1] Jellinek recognizes two types of confederation: first, that in which the acts of the confederate government do not have an immediate binding effect upon the individuals composing the several states; and second, that in which the diet of the confederation is not merely a congress of plenipotentiaries, but a real legislative body, whose acts operate directly and immediately upon individuals rather than upon the states composing the confederation. The latter form approaches closely the so-called federal state. The only example which Jellinek gives of the second type is the Confederacy of the Southern States of North America, 1861–1865. But an examination of the constitution of the Southern Confederacy will show that it was a confederation only in name, and differed in no essential particulars from other states having the federal system of government. "Staatenverbindungen," pp. 189–195.

[2] Hart, "Introduction to Federal Government," p. 32.

[3] By Freeman, for example, in his "History of Federal Government" (1863). For other historical accounts of early federations see A. B. Hart, "Introduction to Federal Government," and Le Fur und Posener, "Bundesstaat und Staatenbund," secs. 4–14.

of those of Greece. During the medieval period several important federations were formed, among which may be mentioned the Rhenish Confederation (1254–1350), which eventually embraced some seventy members. Then came the Hanseatic League (1367–1669), which was originally organized for the promotion and protection of trade, but which gradually developed into a great political power that waged war and negotiated treaties, and eventually came to exercise an important influence on the international affairs of Europe. It had a sort of central legislative organ and a crude judicial machinery for the adjudication of disputes among the members.[1] The Holy Roman Empire (1526–1806), the most extensive federation formed before the nineteenth century, eventually embraced several hundred states of varying types and importance — free cities, ecclesiastical territories, and hereditary monarchies. It maintained a common Diet (*Reichstag*) and several imperial courts.[2] Other examples were: the Swiss confederations of 1291–1798 and 1803–1848, which grew out of the union of three small cantons, but which in the course of time came to embrace all of them;[3] and the United Netherlands, 1576–1746, composed of the Dutch provinces. The two best-known modern examples of confederations were the United States of America from 1781 to 1789 and the German Confederation, 1815–1866. The former turned out to be little more than what the articles of union described it to be, namely, a "firm league of friendship" among the states composing it. It was expressly declared in the articles of agreement that each member of the confederation retained its sovereignty, freedom, and independence and every power, jurisdiction, and right not expressly delegated to the confederation.[4] Its avowed object was to

The Confederation of the United States, 1781–1789

[1] Hart, *op. cit.*, pp. 40–41.

[2] Bryce, "Holy Roman Empire," especially pp. 340–365; Schulze, "Deutsches Staatsrecht," secs. 26–34. [3] Calvo, "Droit international," vol. I, sec. 55.

[4] Articles of Confederation, Art. II.

provide common protection against attack upon any or all of the states.[1] The collective will of the confederation was ascertained and expressed through a congress of delegates constituted without any reference to the populations of the component states. No common administrative or judicial organs were created, the enforcement of the resolutions of the congress being left to the individual states. The powers conferred upon the general congress were so meager and the means of enforcing its will so inadequate that it perished, to use the language of De Tocqueville, through the excessive weakness of its government.[2]

The German Confederation, 1815-1866

The German Confederation embraced at first thirty-eight states of varying rank and importance — kingdoms, grand duchies, principalities, and free cities. It was declared to be a "perpetual league" for the purpose of preserving "the external and internal security of Germany and the independence and inviolability of the confederate states." The collective will of the members was expressed through a Diet of plenipotentiaries which sat at Frankfort under the presidency of Austria. They were appointed by the governments of the states which they represented, and voted according to instructions. The Diet had the power to send and receive ambassadors, to declare war and conclude peace in the name of the confederation, and, under certain conditions, to intervene in the affairs of the individual states. Each state, however, retained the right of legation and could enter into foreign alliances, provided they were not directed against the security of the confederation or of any one of the component states. In case war was declared by the confederation, no state could conclude peace without the consent of the confederation. No member of the confederation could make war against another member, and in case of differences between them the

[1] *Ibid.*, Art. III.

[2] "Democracy in America" (English translation by Reeves), vol. I, p. 168.

disputes were to be submitted to the decision of the Diet. There was an imperial court which had a limited jurisdiction, but there was no common administrative machinery, the enforcement of the resolutions of the Diet being left mainly to the individual states.

VII. FEDERAL UNIONS

Examples of Federal Unions

Where several states unite themselves together under a common sovereignty and establish a common central government for the administration of certain affairs of general concern, or where a number of provinces or dependencies are similarly united by their common superior, the component members still retaining a large local autonomy, but surrendering the management of the whole or nearly the whole of their external affairs to the central government, we have a federal union, or, as is often said, a federal state.[1] The historian Freeman, writing in 1863, said that the four most famous federal commonwealths of history were: the Achæan League in the later days of ancient Greece; the Confederation of Swiss cantons from 1291 to the present; the United Provinces of the Netherlands, 1579–1795; and the United States of America, 1789–1863, which Freeman predicted was at that time nearing its end. The first and last mentioned, he said, represented the

[1] For discussions of the federal state, so-called, see Le Fur und Posener, "Bundesstaat und Staatenbund," especially pp. 186–317; Bornhak, "Allgemeine Staatslehre," pp. 236–254; Brie, "Theorie der Staatenverbindungen," pp. 95 *et seq.*, also his "Der Bundesstaat"; Gareis, "Allgemeine Staatslehre," sec. 41; Carnazza-Amari, *op. cit.*, vol. I, pp. 272–276; Jellinek, "Staatenverbindungen," pp. 253–314; Rivier, *op. cit.*, vol. I, pp. 104–108; Bonfils, "Droit international public," pp. 91–93; Despagnet, *op. cit.*, pp. 133–135; Martens, "Traité de Droit international," vol. I, pp. 326–330; Nys, *op. cit.*, vol. I, pp. 372–377; Pradier-Fodéré, "Traité," etc., vol. I, pp. 207–214; Westerkamp, "Staatenbund und Bundesstaat"; Freeman, "History of Federal Government"; Hart, "Introduction to Federal Government"; Moore, "Digest of International Law," vol. I, sec. 11; Meyer, "Deutsches Staatsrecht," sec. 14; Dicey, "Law of the Constitution," ch. 4; Willoughby, "Nature of the State," ch. 10; Treitschke, "Politik," vol. II, sec. 21; Brater und Bluntschli, "Staatswörterbuch," vol. II, pp. 284 ff.

"most perfect development of the federal principle which the world has ever seen," though there were several ancient confederations "whose constitutions must have realized the federal idea almost as perfectly as the more famous league of Achæa."[1]

Since the publication of Freeman's "History of Federal Government" a goodly number of federal unions have been established in various parts of the world. The most important of these are: the Dominion of Canada (1867); the German Empire (1871); the reorganized Swiss republic (1874); Brazil (1891); the Commonwealth of Australia (1900); and Venezuela (1903).[2]

No Such Thing as a Federal State

Strictly speaking, however, there can be no such thing as a federal state. What is popularly called a federal state is in fact a democratic or aristocratic state having a federal system of government, that is, a dual form of government under a common sovereignty.[3] In this chapter, therefore, our discussion will be restricted mainly to a description of the legal nature of the association created by a union of states under a federal organization, and the discussion of its governmental system will be reserved for the chapter on "Forms of Government."

Marks of a Federal Union

The historian Freeman, who employs the terms "federal government" and "federal state" without discrimination, says, "The name federal government may be applied to any union of component members where the degree of union between the members surpasses that of mere alliance, however intimate, and where the degree of independence possessed by each member surpasses anything which can fairly come under the head of mere municipal freedom."[4] Again, he observes that a "federal commonwealth

[1] "History of Federal Government," p. 7.

[2] The Mexican federal system was established in 1857, and that of Argentine in 1860. The states of Bolivia, Ecuador, Colombia, Chile, and Peru still remain unitary centralized republics.

[3] Compare Burgess, "Political Science and Constitutional Law," vol. I, p. 79.

[4] "History of Federal Government," pp. 2–3.

in its perfect form is one which forms a single state in its relations to other nations, but which consists of many states with regard to its internal government."[1]

Distinction between a Federal Union and a Confederation

Ordinarily the distinguishing marks of a federal union are: first, the existence of a number of political communities possessing of right their own constitutions and forms of government, and being supreme within a certain more or less extensive sphere reserved by their own action; and, second, a common constitution and government, for the direct administration of certain general concerns. Unlike a confederation, a federal union is not a mere league of independent states associated together for purposes mainly of common defense, but it is a union resulting from the merger of a number of political communities for the regulation of various matters common to all the component members. It is a sort of composite state, a new creation of constitutional law, not a band of states connected together by international agreement. The act by which a federal union is established is not a mere compact, but a constitution. In its external relations it resembles a "real union," while internally it bears some resemblance to a confederation. On its international side, observes Hall, it consists of a central government to which the conduct of all external relations is confided and in the absence of any right on the

[1] "History of Federal Government," p. 91. Compare the definition of Jellinek, "Staatenverbindungen," p. 278; also the definition of Le Fur und Posener (*op. cit.*, p. 15): "*In Bundesstaaten haben die Einzelstaaten einen verfassungsmässig bestimmten Anteil an der Bildung des höchsten Willens des Staates. Im Bundesstaat ruht die Souveränität nicht bei einem Gliederstaate, sondern bei der Zentralgewalt, welche von den Gliederstaaten verschieden ist.*" Compare also Montesquieu's definition of a "confederate republic": "This form of government is a convention by which several petty states agree to become members of a larger one, which they intend to establish. It is a kind of assemblage of societies, that constitute a new one, capable of increasing by means of further associations till they arrive at such a degree of power as to be able to provide for the security of a whole body." "Esprit des Lois" (Eng. trans. by Pritchard), vol. I, pp. 136–137. See also Meyer, "Deutsches Staatsrecht," p. 43; and Laband, "Staatsrecht des deutschen Reiches," vol. I, sec. 7.

part of the states to separate themselves from it.[1] It differs from a confederation in the character and degree of the relationship subsisting between the members composing the union and in the possession by the former of a central organization endowed not only with practically exclusive powers in relation to foreign affairs, but also with important powers of government as regards internal affairs of common concern. In a federal union the component parts are subject to a common sovereign, and collectively they form a single united state. In a confederation the parts have no common sovereign, and they do not constitute a single political society, but each is itself a sovereignty. In the federal system there is but one real state, one central government and a number of local governments; in short, the state is coextensive in organization with the organization of the central government. In the confederate system, on the contrary, there are as many states as there are component members.

Distinction between Perfect and Imperfect Federal Unions

Some writers, like Freeman, De Tocqueville, John Stuart Mill, Wheaton, and the authors of "The Federalist," distinguish between *perfect* and *imperfect* federal unions. The difference is one mainly of degree. The former is one which contains no elements of confederatism. It is one in which the central government is fully supreme in all external affairs and in certain specified internal affairs of general concern; which acts directly and immediately upon all individuals within the federation; and which possesses the power and means of enforcing its own declared will. This is what the German writer Brie calls the "ideal federal state." [2] An imperfect federal union is one in which remnants of confederatism survive, one, in short, which is organized more like a confederation than a unitary state.

[1] "International Law," 3d ed., p. 26. See also Jellinek, who remarks that the lack of power on the part of the component members of a federal state to secede therefrom follows from the juristic nature of the union. "Staatenverbindungen," p. 298.

[2] "Der Bundesstaat," p. 140.

The component states possess a limited power in the management of foreign affairs; the acts of the central government are enforced by the individual state governments and "its powers consist simply in issuing requisitions to the state governments when, within the proper limits of the federal authority, it is the duty of these governments to carry it out." [1] The German Empire is a good example of what has been called an imperfect federal union.

The truth is, most federal unions belong to the imperfect type; that is, they represent a mixture of federalism and confederatism. Thus, in the organization of the German Empire the structure of the *Reichstag* and the judiciary is federal in character, while the *Bundesrath* is based on the confederate principle. The states composing the Empire retain a limited power of legation and of military administration, while the execution of the laws of the Empire devolves largely upon the local governments. Certain of the states, moreover, are endowed with important special privileges of which they cannot be deprived without their own consent. These and other features give it a confederate character in a more marked degree than is found in any other existing federal system. The republic of the United States possesses also, though to a less extent, the qualities of both a federal union and a confederacy. This was first pointed out by Madison, who showed that the constitution in its method of adoption, ratification, and amendment, as well as in the organization of the Senate, was confederate in principle, while as regards the sources of the powers of the government, the organization of the army, and the execution of the laws it was federal in character.[2]

[1] Freeman, "History of Federal Government," p. 11.

[2] "The Federalist," No. 39, where Madison distinguished between what he called the "federal" and "national" elements in the origin, structure, and operation of the government of the United States. See also Woodburn, "The American Republic," pp. 65–70; Brie, "Der Bundesstaat," pp. 105 ff.; and Jellinek, "Staatenverbindungen," p. 300.

Organic Character of a Federal Union

In its normal form the government of a federal union, as has been said, acts upon individuals rather than upon the component state organizations; its will is exerted immediately and directly upon the citizens who compose it, and does not reach them simply through the medium of the local governments. Unlike the confederation, there is a general as well as a local citizenship, and all persons within the jurisdiction of the central government owe it direct and immediate allegiance. If war breaks out among the component states, it is civil war, not international war. The component parts of a federal union may themselves be monarchies, or republics, or both; or they may be mere provinces or colonial dependencies, possessing a wide autonomy. Thus, the German federal empire is constructed out of kingdoms, grand duchies, principalities, and free cities. Switzerland is a federation of cantons, some of which have governments organized on the representative principle, others being pure democracies. The federal union of the United States is composed partly of republics called "states," and partly of dependencies called "territories." All the component members (except the territories) are on a footing of equality, none of them enjoying special privileges such as are common in the German Empire. In Canada and some of the Latin-American federations the component parts are simply provinces with more autonomy than belongs to provinces of unitary states.

Component Members of Federal Unions are not themselves States

The communities of which federal unions are composed are not states in the strict sense of the term, though in most federal systems popular usage designates them as such. It is true, however, that in most cases these communities were originally sovereign and independent states, and when they became federated they naturally retained the name, a good deal of the dignity, the historical traditions, and even some of the powers of sovereign states. But, in reality, by the act of federation they lost their sovereignty and with it that quality which most distinguished them as states.

By merging their separate existences into a new and larger personality they became in strict law mere political units, non-sovereign communities, yet withal retaining a degree of local autonomy and of political importance which is not enjoyed by the administrative subdivisions of a unitary state. Unlike the latter they retain, as of right, their own constitutions, their own political arrangements, and the right to participate in the collective will.

Contrary View

While the view here expressed is that the component parts of a federal union are not in reality states, many writers, particularly among the Germans, hold the contrary opinion. They maintain that since the members of a federal union possess all the attributes and characteristics of real states except that of full sovereignty, they may properly be treated as states, rather than as mere administrative circumscriptions. Among the German writers who take this view are Laband, Jellinek, and Seydel. Laband, in explaining the juridical nature of the German federal empire, attributes to the component members the character of real states, while at the same time denying to them the possession of sovereignty.[1] His doctrine is based on the view that the distinguishing characteristic of the state is not sovereignty, but rather the power to command and enforce obedience, and since the individual members of a federal union possess such power, they may be rightfully designated as states. But it may well be observed that if the power to lay down commands and compel obedience be a correct juristic test of the state character, it is difficult to avoid the conclusion that a province or a municipality has an equal claim to be considered a state. The possession of mere local autonomy or independence of action in certain matters — mere power in a local organization to express a will and enforce its commands — is not a mark of statehood. If a non-sovereign community may be rightfully treated as

Sovereignty, not Autonomy, is the Test of State Existence

[1] "Staatsrecht des deutschen Reiches," vol. I, pp. 75 ff.; see also Jellinek, "Lehre von den Staatenverbindungen," pp. 298, 307.

a state, the distinction between states and mere administrative districts disappears or becomes very indistinct indeed. If, however, by the power to command and compel obedience is meant only original, underived, and independent power, then that is undoubtedly sovereignty — a power which the component parts of federal unions certainly do not possess.[1] The individual members of a federal commonwealth have no power to determine their status in the union of which they are a part, or to alter their relations with one another or with the central organization, or to determine the extent of their own jurisdiction or sphere of action. That power in the last analysis lies outside their jurisdiction and, wherever it resides, there is the state. In international relations they are non-entities; in internal affairs they are, legally speaking, nothing but widely autonomous, largely self-governing parts of a state. Whatever the historical process by which federal unions are created, whether, as Lincoln asserted of the American federal republic, they are older than the component parts or the reverse, the parts are the creations of the will of the people as a whole, and they continue to exist subject to that will. If they existed prior to the establishment of the union, they were re-created by the act through which it came into existence and were reinvested by it with the powers which they subsequently possessed.[2]

[1] Compare Burgess in the "Political Science Quarterly," vol. III, p. 128; also Willoughby, "The Nature of the State," pp. 245 ff.; and Duguit, "Droit constitutionnel," p. 142.

[2] Compare Le Fur, "L'État fédéral," p. 680; Duguit, *op. cit.*, p. 142; Borel, "Étude sur le Souveraineté," p. 103. Woodrow Wilson, while admitting that the members of federal unions have lost their power of self-determination with respect to their law as a whole, and that their sphere is limited by the powers of the state superordinated to them, asserts, nevertheless, that they are states because "their powers are original and inherent, not derivative; because their political rights are not also legal duties; and because they can apply to their commands the full imperative sanctions of law." "Old Master and Other Essays," pp. 93–94. But, as we have endeavored to show above, their powers are not original and underived. What would Mr. Wilson say of the powers of the component members of the Canadian federation, where the powers of the provinces are delegated rather than reserved?

Theory that the Component Members of a Federal Union are partly Sovereign

Many writers have attempted to explain the relation between the federal union and its parts by attributing a portion of sovereignty to each. This theory assumes that sovereignty is capable of being divided and distributed at will. According to this view the state formed by the union of the parts is sovereign in respect to those matters which by the constitution are committed to its care, while the component members are equally sovereign with respect to those matters intrusted to them. In other words, each is sovereign within its constitutional sphere. This view has been ably defended by such scholars as Waitz, S. Meyer, Schulze, Bluntschli, Gerber, Rüttiman, Von Mohl, and Treitschke in Germany; by Freeman and Oppenheim in England; by De Tocqueville and Rivier in France; and by Kent, Story, Cooley, and others in America. It is also the view that has been uniformly maintained by the United States Supreme Court.[1] Since a discussion of this question would involve a consideration of the theory of divided sovereignty, it will be passed over until that subject is reached in the course of this work.

Procedure by which Federal Unions are organized

Federal states, so called, have usually been created in one of two ways: first, they have been formed by a voluntary coalescing of a number of sovereign and independent states; or, the federal system has been imposed from without, as where a unitary state has established federalism among the provinces of which it is composed. An example of the latter method was furnished by the creation of a federal republic out of the provinces of the Empire of Brazil in 1889. A somewhat similar procedure was that by which the colonial provinces of British North America and the Australian Colonies were federated in 1867 and 1900 re-

[1] See, for example, the decision of the court in the License Cases (5 How.), where the general government and those of the states were spoken of as "separate and distinct sovereignties, each acting separately and independently of the other within their respective spheres." Compare also Lowell, "Essays on American Government," chapter on "Sovereignty."

spectively. In both cases the federation was constructed, not out of already existing independent states, as was the case in the United States and Germany, but out of a group of colonial dependencies.[1]

Conditions essential to Federation

Two conditions, observes Dicey, must be present in the formation of a federal union: first, there must be a body of communities (states, cantons, colonies, provinces) connected by locality, history, race, or the like, capable of bearing, in the eyes of their inhabitants, an impress of common nationality; second, there must exist a "very peculiar sentiment" among the inhabitants; that is, they must desire union without unity, must be able to adjust the conflicting ideas of union and separation and to reconcile the advantages of national union with the disadvantages of a division of a power and diversity of legislation. There must be a wish to form for many purposes a single state without surrendering the individual existences of each. A "federal state" indeed is nothing more than a "political contrivance intended to reconcile national unity and power with the maintenance of state rights" through an adjustment satisfactory to both elements.[2] The history of federal states shows that they have generally been formed under the pressure of international necessity rather than under that of internal needs.[3]

Constitution of a Federal Union

Whatever the method of procedure by which a federal union is established, there must be a common organic act or constitution defining the relation between the federated state and the parts of which it is composed, and marking out for each its own sphere of action. This constitution must be paramount in respect to the constitutions of the component members, otherwise the maintenance of the federation intact will be impossible. It is also essential

[1] On the methods of forming federal unions see Brie, "Theorie der Staatenverbindungen," pp. 128 ff.; and Jellinek, "Staatenverbindungen," pp. 253–275.

[2] "Law of the Constitution" (second edition), pp. 129–132.

[3] Compare Martens, "Traité de Droit international," vol. I, p. 326.

that this constitution should be written. The foundations of a federal state, to quote Dicey again, rest on a "complicated contract," and the arrangements which it establishes cannot safely be left to mere understanding or convention. Its articles must therefore be reduced to writing, and they ought to be clearly and fully stated on all fundamental points so as to remove the possibility of misunderstanding. The failure to do this in the constitution of the United States left open important questions which became the source of long and violent controversy and ultimately of civil war. These articles should not only be written, but they should possess a certain degree of rigidity; that is, they should be rendered incapable of alteration by either the central or local governments, but should be alterable only by the power which created both and defined their spheres.

Need of Common Tribunal to interpret the Constitution

Finally, there ought to be a common tribunal empowered to interpret the prescriptions of the federal constitution, to judge of the limits of the respective spheres of the central and local governments, and to hold in restraint the tendencies of each to encroach upon the domain assigned by the constitution to the other. This tribunal should be empowered to determine all controversies among the component states themselves as well as between them and the central government, and it ought to have also the power to set aside the provision of any local constitution or law which is inconsistent with the constitution or laws of the union.

VIII. PART-SOVEREIGN STATES

Characteristics of Part-sovereign States

Many writers, as has been said, treat as states for limited purposes certain communities not in the possession of full sovereignty, and hence they do not consider sovereignty an essential mark of the state, at least for international purposes.[1] Communities of this kind, while dependent to

[1] Compare Westlake, for example, "International Law," vol. I, p. 21; also Hall, who recognizes states "in the possession of imperfect independence," "Inter-

a greater or less extent upon other states, nevertheless usually possess large powers of local self-government and a limited international personality. But if we observe strictly the test laid down in an earlier chapter for determining the state character, we cannot regard such communities as states, but only as dependencies or parts of other states. The designation of states as part-sovereign is based upon the assumption that sovereignty is capable of being divided — a theory which the best writers regard as quite inadmissible, and the fallacy of which we shall endeavor to establish in our chapter on sovereignty.

Examples of Part-sovereign States

Examples of so-called part-sovereign states, *Unterstaaten* as the Germans call them, are: (1) the component members of federal unions; (2) communities under the suzerainty of other states; and (3) communities under the protection of other states. The degree of autonomy possessed by each and its status as an international entity depend upon the particular circumstances of each case, there being no general rule governing the matter.

(1) Members of Federal Unions

Regarding the first class of so-called part-sovereign states — the members of federal unions — we have already pointed out that rarely do they possess even the most limited international personality.[1] Although they are often called states and regarded as real states by some German writers of high standing, yet the weight of the best scientific opinion is adverse to such a view.

(2) Suzerain Communities

The second group of so-called part-sovereign states, namely, communities under the suzerainty of other states, are, says Hall, portions of states which during a process of

national Law," sec. 4. See also Oppenheim, "International Law," vol. I, pp. 101–103; Despagnet, "Cours de Droit international public," pp. 136–145; Nys, *op. cit.*, vol. I, pp. 349–357; and Carnazza-Amari, *op. cit.*, vol. I, pp. 322–367.

[1] An exception is found in the power of the members of the German Empire to send and receive diplomatic envoys, to grant exequaturs to foreign consuls within their territories, and to enter into conventions with foreign powers, concerning matters not falling within the jurisdiction of the imperial government. Moore, "Digest of International Law," vol. I, p. 25.

gradual disruption or by the grace of the sovereign have acquired certain of the powers of an independent community, such as that of making commercial conventions or of conferring their exequaturs upon foreign consuls.[1] The paramount state is called the suzerain, and its relation to the subject state is described by the term "suzerainty."[2] The relation between the suzerain state and the vassal state depends upon the circumstances of the particular case. In general it may be said that the vassal community has only such rights as have been expressly granted to it by the paramount state. It always has a certain international capacity, but is subject to a greater or less extent to the paramount state in the management of its foreign affairs. It is, however, generally independent of foreign control as regards its internal affairs. In the conduct of the foreign relations of the dependency the suzerain may have the full power of initiation, or partial initiation, or only the negative power of veto over the acts of the vassal state.

Examples of Suzerainties

Examples of communities under the control of a suzerain are Egypt and, until recently, Bulgaria. Egypt is a tributary and vassal state theoretically under the suzerainty of the Ottoman Porte, but in fact it is under the administration of England. It has a hereditary ruler of its own, but he receives his investiture from the sultan. It sends and receives consuls, who may bear the added title of diplomatic agent, and has the power to conclude commercial and postal treaties with foreign states without the consent of the suzerain. Bulgaria, by the Treaty of Berlin, 1878, was made a "tributary and autonomous principality" under the suzerainty of Turkey. Like Egypt, it had the power to send and receive consuls and diplomatic agents, and in 1885 it waged war against Servia without the consent of Turkey, although its right to do so was denied. Bulgaria, however, has recently declared its independence of Turkey. Moldavia and Wallachia

[1] "International Law," 3d ed., p. 31.

[2] Moore, "Digest of International Law," sec. 13.

were also formerly under the suzerainty of Turkey. The former South African Republic under the suzerainty of Great Britain was another example of this type of part-sovereign state. By a treaty of February 27, 1884, with Great Britain, it engaged to conclude no treaty with any other power than the Orange Free State without approval by the crown of England. The suzerain status is usually temporary and is generally terminated by the action of the vassal in throwing off its dependence, as Roumania did in 1878 and as Bulgaria did in 1908; or by conquest and annexation by the suzerain, as was the case with the South African Republic during the late Boer War.[1]

(3) Protected States

The third form of the so-called part-sovereign state is the "protected state." "For the purposes of international law," says a noted authority, "a protected state is one which, in consequence of its weakness, has placed itself under the protection of another power on defined conditions or has been so placed under an arrangement between powers the interests of which are involved in the disposition."[2] Unlike a community under the suzerainty of another state, the rights of a protected state are rather residuary than delegated in their nature, and the presumption therefore is in favor of any international capacity claimed by it. Unlike a suzerain community, also, a protected state always retains a certain international capacity and is, therefore, a subject of international law. The establishment of a protectorate usually takes place when a weak state places itself under the guardianship and protection of a more powerful state, handing over to the latter the management of its more important foreign relations.

[1] For the literature dealing with suzerainties, see Hall, *op. cit.*, p. 31; Nys, *op. cit.*, vol. I, pp. 357–364; Oppenheim, "International Law," vol. I, pp. 133–137; Westlake, "International Law," vol. I, pp. 25–27; Lawrence, "Principles of International Law," sec. 50; Wheaton, "Elements," sec. 37; Taylor, "International Public Law," secs. 140–144; and Boghitchévitch, "Halbsouveränität."

[2] Hall, "International Law," sec. 4.

Examples of Protectorates

The most recent example of the kind was the establishment of a protectorate by Japan over Korea in 1904. The degree of the control exercised by the protecting state varies widely and depends upon the particular facts of each case, the terms and conditions upon which the protectorate is maintained being embodied in a treaty between the protected state and the protector. Some, like the French protectorate of Indo-China, are nothing more than colonies; while others have practically complete control over their internal and external affairs. The citizens or subjects of a protected state retain their own distinct nationality, and must remain neutral in a war between the protecting state and a third power. In the case of the Ionian Islands, which were under the protection of Great Britain from 1815 to 1863, the control exercised by the protector included only the management of the foreign relations of the islands and the appointment of the executive. The islands were declared to be a "free and independent state," were not included in British treaties unless especially named, received consuls from other states, and had their own commercial flag.[1]

Examples of Protected States

The only protected states in Europe to-day are the petty republics of Andorra, under the joint protection of France and Spain, and of San Marino, under the protection of Italy, and possibly the principality of Monaco, which is theoretically under the protection of Italy. Inasmuch, however, as the right of protection in the latter case has not been exercised since the establishment of the Italian kingdom, Monaco is claimed by some to be an independent state.[2] In Africa there are various petty states under the protection of European powers, among which may be mentioned Zanzibar and Tunis, under the protection of Great Britain and France respectively. Until 1896 Madagascar

[1] Hall, *op. cit.*, p. 30; Wheaton (Lawrence's ed.), p. 61; Twiss, "Law of Nations," ch. 4; Phillimore, "International Law," vol. I, sec. 77.

[2] Cf. Oppenheim, *op. cit.*, vol. I, p. 139; Hall, *op. cit.*, p. 31.

was a French protectorate, but in that year it was annexed to France as a colony.[1]

IX. NEUTRALIZED STATES

A state whose independence and integrity have been guaranteed by the joint action of other states and placed in a condition in which it is forbidden to engage in offensive war is said to be neutralized. Its immunity from attack on the part of other states is usually guaranteed by way of compensation for the restriction placed upon its freedom of action with regard to making offensive war. The status of neutralization may be conferred upon a weak state at its own request as a means of protection against ambitious and unscrupulous neighbors; or it may be conferred without regard to its own wishes by other states out of considerations affecting the general peace or the balance of power. Small states so geographically situated that they are in danger of being overrun by contending armies and of having their neutrality otherwise disregarded by opposing belligerents, are those which have usually been neutralized by the collective action of other states. The method by which neutralization takes place is usually by international treaty between the powers concerned. The state so neutralized must abstain from engaging in hostilities against other states except as a matter of defense and must avoid any act which would involve it in war with

[1] For the literature of protectorates see in addition to the authorities cited: Despagnet, "Essai sur les Protectorats" (1896); Boghitchévitch, "Halbsouveränität" (1903); Heilborn, "Das völkerrechtliche Protectorat" (1891); Carnazza-Amari, *op. cit.*, vol. I, pp. 265–269; Engelhardt, "Les Protectorats"; Le Fur und Posener, *op. cit.*, sec. 8; Wheaton, sec. 13; Rivier, "Principes," vol. I, pp. 79–93; Oppenheim, sec. 92; Nys, *op. cit.*, pp. 364–366; Moore, "Digest," sec. 14; "Colonial Systems of the World" (published by the U. S. Bureau of Statistics, Treasury Department, 1898); Pradier-Fodéré, "Traité de Droit international public," vol. I, pp. 176 ff. See also an article entitled "Über den Staatsbegriff" by Werner Rosenberg, "Zeitschrift für die gesamte d. Staatswissenschaft," 1909, Erstes Heft, pp. 22–31.

another state. In all other respects it is fully sovereign and independent, and can enter into treaties of all kinds, except possibly those of alliance and guarantee, and can of course maintain armies and navies for purposes of defense.[1]

Examples of Neutralized States

Examples of neutralized states are: Switzerland, whose permanent neutrality was recognized and guaranteed by the Powers through the act of the Vienna Congress in 1815; Belgium, whose neutrality was guaranteed by the Treaty of London in 1831 and renewed by a similar treaty in 1839; the Grand Duchy of Luxembourg, neutralized by the Treaty of London in 1867; and the Congo Free State, whose neutrality the signatory powers of the General Act of the Berlin Congo Conference of 1885 agreed to "respect" provided the power in possession of the Congo territory should proclaim its neutrality. This the king of the Belgians did, and his act was recognized by the powers. Finally, by a treaty signed at Christiania, November 2, 1907, Great Britain, France, Germany, and Russia, "animated by a desire to secure to Norway . . . her independence and territorial integrity, as also the benefits of peace," obligated themselves to "recognize and respect" the integrity of Norway, and agreed in case the integrity of the Norwegian kingdom was "threatened or impaired by any power whatsoever," they would afford the Norwegian government their support with a view to safeguarding the integrity. Norway was also a party to the treaty, and agreed not to cede any portion of its territory to any power.[2]

[1] An exception is found in the treaty by which Luxembourg was neutralized. This treaty forbids the maintenance of any fortress or the keeping of any armed force except what may be necessary for the maintenance of domestic order and safety.

[2] For the literature relating to neutralized states see Despagnet, "Cours de Droit international public," pp. 145–162; Nys, *op. cit.*, vol. I, pp. 379–398; Oppenheim, vol. I, pp. 140–146; Moore, "Digest," vol. I, sec. 12; Holland, "Studies in International Law," pp. 270–272; Rivier, "Principes," vol. I, sec. 7; Piccioni, "Essai sur la Neutralité perpetuelle"; Regnalt, "Des effets de la Neutralité perpetuelle"; Tswettcoff. "De la Situation juridique des États neutralisés."

X. INTERNATIONAL UNIONS

Juristic Bases of Union

For the accomplishment of certain common objects and the promotion of mutual interests, states not infrequently associate themselves by formal agreement into unions (*Staatenvereine*, *Staatengemeinschaften*). Such unions in the past have been numerous and diverse in character. They have differed not only as regards their legal nature, but also as regards their purposes, objects, and duration. Juristically considered, the basis of the union may be: first, the principle of equality or coördination, according to which each member retains its sovereignty and independence unrestricted; second, the principle of inequality according to which some of the members stand in the relation of superiority to others, the latter occupying a status of subordination; and, third, the principle of equality among the associated members, all of which have the same power, but are subordinate to a central government.[1]

Unorganized and Organized Unions

According to Brie and Jellinek international unions may again be classified as *unorganized* and *organized*. An unorganized union is one in which more or less permanent relations are established for the promotion of common policies or the maintenance of certain relations, but in which there is no common governmental organization for the exercise of a common will, or for purposes of administration. Jellinek enumerates as examples of unorganized unions: alliances of various kinds, leagues of friendship, loosely connected federations, and a certain kind of composite state which he describes by the term *Staatenstaat;* that is, a so-called state composed not of individuals, but of inferior states, which receive their powers from a superior. Examples of the *Staatenstaat* were the feudal states of the Middle Ages and the old German Empire after the Peace of Westphalia.[2]

[1] Brie, "Theorie der Staatenverbindungen," p. 25. See also Jellinek, "Lehre von den Staatenverbindungen," pp. 58 ff.

[2] For Jellinek's conception of the *Staatenstaat* see his "Staatenverbindungen," pp. 137 ff. See also Gareis, "Allgemeine Staatslehre" in Marquardsen's Handbuch, vol. I, sec. 39, for a discussion of the *Staatenstaat*.

Other examples were the Christian states of the Mohammedan Empire; the vassal states of the Ottoman Porte, such as Egypt and Tunis; such relationships as those between the United States and the Indian tribes, and between Nicaragua and the Mosquito Coast; the tributary states of Asia; the native states of India; the relation of Holland to Java; the relation between China and Siam; etc.[1]

The organized union differs from the unorganized union in possessing the element of permanency, an independent administrative organ, and a common will. Examples of this type of union are: (1) the various international administrative unions; (2) real unions; (3) confederations (*Staatenbunden*); and (4) federal unions (*Bundesstaaten*). Of these all except the first mentioned have already been described.

International Administrative Unions

Among the more important international administrative unions may be mentioned: (1) the International Postal Union, established by treaty in 1874, for the creation of a single postal territory for the reciprocal exchange of mails between the member states; (2) the International Rhine Navigation Commission, created by the Vienna Congress for the enforcement of common regulations governing the navigation of the river Rhine; (3) the European Danube River Commission, created in 1856 by the Treaty of Paris for a similar purpose and having permanent offices at Galatz; (4) the International Telegraph Union, created in 1865 by the Conference of the Powers at St. Petersburg; (5) the International Metric Union, created in 1875, and having as its common organ the International Bureau of Weights and Measures, with permanent offices at Sèvres, near Paris; (6) the International Union of Railway Freight Transit, created in 1893, and having a central bureau at Berne; (7) the International Union for the Protection of Literary and Artistic Property, with a permanent central bureau at Berne;

[1] Jellinek, "Staatenverbindungen," pp. 137–157.

(8) the International Association for the Protection of Labor, with an international office at Berne; (9) the International Sugar Commission, with a bureau at Brussels; (10) the International Commission of Insurance, with a bureau at Brussels; (11) the International Prison Association, with a secretariat at Berne; (12) the International Sanitary Association, with an office at Paris; (13) the International Bureau of American Republics at Washington, created in 1890 and reorganized in 1906; (14) the Congress of Hygiene and Demography, with a permanent commissioner at Brussels; (15) the International Seismological Association; (16) the International Office of Public Health, created by an international convention signed at Rome in December, 1907; and (17) the International Institute of Agriculture at Rome, created by an international convention signed at Rome, July 7, 1905. It is announced that an International Bureau of Wireless Telegraphy is to be established in the near future. Most of these unions have been created by international agreement, and some of them, like the Postal Union, embrace practically all the civilized states of the world. Provision is made in the acts creating some of them for the holding of congresses at periodic intervals at which each member state may be represented and entitled to one vote. Thus a congress representing the Telegraph Union is held every three years; the Postal Congress meets every five years; the Union of Weights and Measures holds a congress every six years. Most of them maintain a central administrative bureau or office, usually at Berne. The river commissions have inspectors to supervise the execution of common arrangements, and the common expenses are borne by the members of the union in some proportion agreed upon.[1]

[1] See a valuable article by Paul S. Reinsch entitled "International Unions and their Administration," in the "American Journal of International Law," for July, 1907. See also G. Moynier, "Les bureaux internationaux" (1892); Deschamps, "Les offices internationaux"; and Held, "System der Verfassungsrecht," ch. 15.

CHAPTER VI

FORMS OF GOVERNMENT

Suggested Readings: ARISTOTLE, "Politics," III, 6; BENTHAM, "Fragment on Government," Works, vol. I, pp. 272–276; BLUNTSCHLI, "Allgemeine Staatslehre," bk. VI, chs. 19–23; BORNHAK, "Allgemeine Staatslehre," pp. 25–62; BRADFORD, "Lessons of Popular Government," vol. I, chs. 2, 3, 14; vol. II, ch. 28; BROUGHAM, "The British Constitution," Works, vol. XI, chs. 1 and 2; JETHRO BROWN, "The Austinian Theory of Law," ch. 4; BURGESS, "Political Science and Constitutional Law," vol. II, bk. III, chs. 1 and 2; DE PARIEU, "Principes de la Science politique," chs. 1–5; DE TOCQUEVILLE, "Democracy in America," pt. II, bks. II and III; DUGUIT, "Droit constitutionnel," pt. I, secs. 51, 52, 58, 59, 61; also his "L'État, les Gouvernants et les Agents," ch. 3; ESMEIN, "Droit constitutionnel," pt. I, chs. 2, 5; "Federalist," Nos. 10, 14, 39; GAREIS, "Allgemeine Staatslehre," in MARQUARDSEN'S "Handbuch des öffentlichen Rechts," vol. I, secs. 12–21, 38–42; GERBER, "Grundzüge des deutschen Staatsrechts," secs. 24–34; LAVELEYE, "Le Gouvernement dans la Démocratie," vol. I, bks. V, VI; vol. II, bks. X, XI; LEACOCK, "Elements of Political Science," pt. I, ch. 7; LECKY, "Democracy and Liberty," vol. I, chs. 1, 3; LEWIS, "Use and Abuse of Political Terms," pp. 58–97; LOCKE, "Two Treatises of Government," secs. 132–133; MAINE, "Popular Government," essays I, II; MEYER, "Deutsches Staatsrecht," secs. 1, 8, 9, 12, 13, 14; MILL, "Representative Government," chs. 1–3, 6–7, 8; MOREAU, "Précis élementaire de Droit constitutionnel," pp. 26–40; PALEY, "Political and Moral Philosophy," bk. VI, ch. 6; PRADIER-FODÉRÉ, "Principes généraux de Droit de Politique et de Législation," chs. 9 and 10; PRINS, "De l'Esprit du Gouvernement democratique," chs. 1 and 2; REHM, "Allgemeine Staatslehre," secs. 39–48, 84–85; ROSCHER, "Politik," bk. I, ch. 2; bk. II, ch. 5; bk. IV, ch. 2; ROUSSEAU, "Contrat social," bk. II, chs. 3–9; SIDGWICK, "Elements of Politics," chs. 26–30; VACHEROT, "La Démocratie," especially chs. 1 and 2; WAITZ, "Grundzüge der Politik," pp. 153–219; WILLOUGHBY, "Nature of the State," ch. 13; WOOLSEY, "Political Science," vol. I, pt. III, chs. 2 and 3; vol. II, pt. III, chs. 4, 6, 7, 8; ZACHARIA, "Vierzig Bücher vom Staate," bks. 16–19.

I. MONARCHIES, ARISTOCRACIES, AND DEMOCRACIES

Principle of Classification

HAVING examined the several forms of states and associations of states, we come now to consider the forms of government, keeping in mind that government is not the state, but, as Francis Lieber has remarked, merely the instrument or contrivance through which the state acts in all cases in which it does not act by direct operation of its sovereignty.[1] Following the same principle observed in the classification of states, namely, the number of persons in whom the supreme power is vested, we shall find that governments may be classified as monarchical, aristocratic, and democratic.[2] If the supreme governing authority is vested in a single person, however numerous his subordinates, the form of government is said to be monarchical.[3] Popular usage, however, considers any government having a hereditary executive to be a monarchy, even though its legislative department rests upon a popular basis. In short, popular usage makes the test the nature of the executive tenure and the tenure of the titular executive at that.[4] Thus most of the governments of Europe are com-

[1] "Political Ethics," vol. I, p. 238.

[2] The classification of governments with respect to whether the controlling power is in the hands of one man, a few or the many, is, says Willoughby ("Political Theories of the Ancient World," p. 108), as old as Pindar and Herodotus. See also Woolsey, "Political Science," vol. I, pp. 466–468. It was, as we have seen, Aristotle's basis of classification for states, though there is a difference of opinion as to whether his classification was intended to be that of states or governments. See his "Politics," III, 6.

[3] Manifestly no satisfactory definition of monarchy can be framed. The above definition, for example, will not fit the numerous plural monarchies to be referred to below. On the other hand it describes pretty accurately some republics which have at their head a single executive.

[4] Some political writers of high standing accept this test as proper. Duguit, for example ("Droit const.," p. 375), defines monarchy as "that form of government in which the chief of state is hereditary." According to him the hereditary tenure of the executive is the mark which distinguishes a monarchy from a republic, the latter being defined by him as a form of government in which the chief of state is not hereditary but elective. Jellinek ("Recht des mod. Staates," p. 653) criticises such a distinction as an abstraction and shows that the correct test is not the nature of

monly styled monarchies, when in reality only the executive part of the government is constituted on the monarchical principle. The modern term "monarchy," as Sidgwick observes, is largely used to denote governments in which only a share of power is left to the single individual called the monarch.[1]

If the supreme governing authority is intrusted to a small group or class of the population, the government is said to be aristocratic. It is a government in which only a minority of the citizens have a share, the rest of the population, as Montesquieu remarks, being in respect to the former the same as the subjects of a monarch in regard to the sovereign.[2] If the great mass of the adult male citizens share in the government, either through the choice of its agents, through participation in the enactment of law by means of the so-called initiative or referendum, or through a popular assembly of all the citizens, we have a democratic form of government or a democracy. Professor Seeley defined democracy more broadly as a government in which every one has a share.[3] John Austin said it signified any government in which the governing body is a comparatively large fraction of the entire nation. Sir Henry Maine said it could be most accurately described as "inverted monarchy." [4]

the executive tenure, but the number of persons in whom the governing power is vested. Furthermore, as will be shown later, there have been numerous examples of elective monarchies as well as hereditary republics, such as the Netherlands in the seventeenth and eighteenth centuries.

[1] "Elements of Politics," p. 607. Bernatzik (*Republic und Monarchie*) contends that the true criterion is, that in a monarchy, whether absolute or limited, hereditary or elective, the head of the state has a subjective right to his office irrespective of the method of his selection. The head of a republic, however, has no such right to his office.

[2] "Esprit des Lois," bk. II, ch. 3. Cf. also Aristotle, "Politics," IV, 7.

[3] "Introduction to Political Science," p. 324.

[4] "Popular Government," p. 59. Thomas Jefferson conceived democracy to be government by the citizens in mass, acting directly and personally according to rules established by the majority (Works, vol. X, p. 28). A democracy, said Hamilton, is a

Non-identity of State and Governmental Forms

The classification of governments as monarchical, aristocratic, and democratic is identical with the classification of states given in the preceding chapter, but it does not follow that the form of government in any given state is necessarily identical with the form of state, though usually they are similar in form and spirit. A democratic state, for example, is apt to have a government in which democratic or popular elements predominate. But while this is the natural and usual condition, it is quite possible that a democratic state should have a government organized upon an aristocratic basis. Indeed, it is difficult to see why such a system is not the nearest approach to the ideal, provided the aristocracy is one of real merit rather than one which is artificial in character.[1] Strictly speaking, there are no longer any pure monarchical governments in Europe. What are loosely and popularly called such are in fact mixed governments, that is, governments composed of monarchical, aristocratic, and democratic elements combined. The truth is, as Rousseau remarks, all governments are in a sense mixed.[2] There is

government where the power is in the hands of the people and is exercised (1) by themselves, (2) by their representatives, mediately or immediately. "Federalist," No. 9.

[1] Compare Burgess, "Political Science and Constitutional Law," vol. I, p. 72.

[2] "Contrat social," bk. III, ch. 7. Aristotle, Plato, Cicero, and Polybius seem to have recognized the mixed type of constitution, Cicero and Polybius treating Rome as an example of such a form. Polybius dwelt upon the excellence of this form, and declared it to be the best of all for men. (See Woolsey, "Political Science," vol. I, pp. 470–472.) Woolsey (p. 474) criticises the term "mixed" on the ground that a government cannot be partly in the hands of one, the few and the many. He prefers the term "limited" instead. Tacitus spoke of a government compounded out of democratic, monarchical, and aristocratical elements. Pradier-Fodéré, in his "Principes généraux de Droit de Politique," etc. (ch. 9), discussed mixed forms at length and pointed out that the varieties are almost infinite in number. It would be necessary, he said, to write the history of all peoples in order to enumerate all the forms of mixed constitutions that have been in force since the beginning of the world. Bluntschli, in his "Allgemeine Staatslehre" (bk. VI, ch. 2), devotes a chapter to what he styles the "mixed state." But strictly speaking, there can be no such thing as a mixed state, the term "mixed" being descriptive only of a form of government. Compare also Treitschke, "Politik," vol. II, p. 13, who defined a mixed state as one

no modern civilized state in which the governing power is vested wholly in the hands of a single person. In the typical monarchies, so called, of Europe, there is an hereditary chief of state and a legislative body, containing usually both aristocratic and democratic elements. Only in certain absolute states of Asia and Africa do we find anything approaching pure monarchical government, that is, one in which the ruling power is vested in the hands of a single person.

Elective Monarchies

On the basis of the source or tenure of the executive, monarchies may be classified as hereditary or elective, or they may be a combination of both. All of the monarchies of the present day are hereditary, though there have been many exceptions in the past. The early Roman kings were elective, as were the kings of the ancient monarchy of Poland. The head of the Holy Roman Empire, as is well known, was chosen by a small college of electors, though usually from the same family. Under the Treaty of Berlin, of 1878, the reigning prince of Bulgaria owed his throne to election. In general, it may be said that the installation of dynasties in newly formed states usually takes place through election, though the crown thereafter is generally transmitted according to certain rules of hereditary succession.[1] It may also be stated as a general proposition that in the early history of states kings were generally chosen or in some way accepted in the first instance, though

in which monarchy, aristocracy, or democracy are "moderated or limited by other political factors," as where a monarchy is limited by an aristocratic or popular chamber. If applied to the description of a form of government, no fault can be found with this statement. On the subject of mixed governments see De Parieu, "Principes de la Science politique," ch. 5, and "The Federalist," No. 9.

[1] Thus the present wearer of the crown of Norway was elected by the parliament only after a plebiscite which pronounced in his favor, but henceforth the crown will be transmitted according to the principle of hereditary succession. In 1903 after the assassination of the king of Servia, his successor was chosen by the national parliament. Roscher ("Politik," p. 23) maintains that an elective monarchy is no true monarchy, but only a special kind of republic, a view which has much to commend it.

the hereditary feature was so strong that the elective principle was gradually pushed into the background.[1] Speaking of the election of the early English kings, Stubbs observes that "the king was in theory always elected and the fact of election was stated in the coronation service throughout the Middle Ages in accordance with the most ancient precedent."[2] "But," he adds, "it is not less true that the succession was by constitutional practice restricted to one family, and that the rule of hereditary succession was never, except in great emergencies and in most trying times, set aside." In a sense, of course, the English monarchy is still elective, since Parliament claims and exercises the right to regulate the law of succession at its pleasure.[3]

Absolute and Limited Monarchies

Again, monarchy may be either of the absolute type, in which case the monarch is sovereign, and state and government, legally and politically speaking, are identical, or it may be constitutional or limited in form. In the former case the monarch is bound by no will except his own; in the latter case he is bound by the prescriptions of a constitution which he has sworn to support, and hence the royal office is nothing but an organ of government. No examples of the former type of monarchy, as has been said, are found to-day outside of Asia and Africa. All of the so-called monarchies of continental Europe now have written constitutions, framed either by national assem-

[1] Compare Woolsey, "Political Science," vol. I, pp. 520–528.

[2] "Constitutional History of England," vol. I, p. 150. Waitz ("Deutsche Verfassungsgeschichte," vol. I, p. 298) points out that most of the early German monarchies were elective. The right of the reigning king to recommend his successor was recognized, but the people "confirmed, acknowledged, and chose."

[3] William and Mary, for example, were chosen as reigning sovereigns in 1689 by a convention Parliament; and two years later a new law of succession was passed, fixing the crown on a different branch of the royal house from that upon which it would have descended according to the existing rules of succession. The history of other countries of Europe furnishes examples of elective monarchies. Thus Louis Napoleon became emperor of the French in 1852 through the forms of a plebiscite; and a vacancy in the Spanish throne was filled by parliamentary election in 1873.

blies representing the people, or granted by ruling sovereigns and accepted by the people.[1] Monarchies may of course be still further subdivided, but little or nothing would be gained by extending the classification beyond hereditary and elective, absolute and limited types.[2]

Kinds of Aristocracy

Aristocracies, like monarchies, may likewise be of several varieties. There may be aristocracies of wealth, and these may be based either on ownership of land or of all property in general; or they may be hereditary and hence based upon birth or family connection; or they may be official in character, that is, composed mainly of those who hold or have held public office; or they may be military or a combination of some or all of the above elements.[3]

[1] States as well as governments are sometimes classified as absolute and limited, but obviously no such classification can be defended. Legally all states in the sense in which the term "state" has been defined in this work are absolute and unlimited as to their powers, and hence it is superfluous to speak of an absolute state and an error to speak of a limited state. Such terms are descriptive of *governments* only. Legally what is sometimes called a limited or part-sovereign state is in fact nothing but a dependency of some other state.

[2] Bluntschli ("Allgemeine Staatslehre," bk. VI, ch. 7) extends the classification of monarchies much farther and recognizes the following forms: despotisms, civilized monarchies, patriarchal kingships, feudal monarchies, Frankish monarchies, absolute monarchies, constitutional monarchies, limited monarchies, military and judicial principalities, etc. See also his essay entitled "Staatsformen," in his "Psychologische Studien über Staat und Kirche." Such a classification rests upon no single logical consistent principle and has no interest for us. Woolsey classified monarchies as city states, absolute monarchies, theocratic monarchies, limited, elective, mixed, and constitutional monarchies. "Political Science," vol. I, pp. 485 ff. The classification given in the text above is that adopted by Jellinek, though he goes farther and subdivides the limited type into parliamentary and constitutional forms ("Recht des mod. Staates," pp. 670–692). For further discussion of monarchical governments, see Duguit, "Droit constitutionnel," sec. 58; Bluntschli, "Politik," pp. 295–304; Jellinek, *op. cit.*, pp. 653–692; Roscher, "Politik," bks. I and III; Bruno Schmidt, "Allgemeine Staatslehre," vol. I, pp. 264 ff.; Pradier-Fodéré, "Principes généraux de Droit de Politique," etc., pp. 242–244; Bernatzik, "Republik und Monarchie."

[3] Rousseau classified aristocracies as natural, hereditary, and elective ("Contrat social," bk. III, ch. 5). Roscher ("Politik," sec. 18) classified them as noble or landed (*Ritteraristokratie*), priestly, and plutocracies and oligarchies. The ancient writers, among them Aristotle, considered an oligarchy to be a government by a wealthy minority in their own interest; that is, it was a perversion of aristocracy.

Kinds of Democracy

Democracies are of two kinds: pure or direct, and representative or indirect.[1] A pure democracy is one in which the will of the state is formulated and expressed directly and immediately through the people acting in their primary capacity. A representative democracy is one in which the state will is ascertained and expressed through the agency of a small and select number who act as the representatives of the people A pure democracy is practicable only in small states where the voting population may be assembled for purposes of legislation, and where the collective needs of the people are few and simple. In large and complex societies, where the legislative wants of the people are numerous, the very necessities of the situation make government by the whole body of citizens a physical impossibility.

Pure Democracy

In the city states of antiquity pure democracies were not impossible, and they were not uncommon; but in the states of the modern world and under modern conditions they are impossible. The only surviving examples to-day are found in four of the petty and largely primitive cantons of Switzerland. What is in substance a representative democracy is sometimes called a republic or a republican government.

Republics

Although restricted by modern usage to a government conducted through agents popularly chosen, yet the term "republic," as Hamilton and Madison pointed out in "The Federalist," has often been employed to describe governments which popular usage to-day would designate

Professor Seeley remarks that an oligarchy is a deranged and diseased aristocracy ("Introduction to Political Science," lect. VI). The ancients distinguished carefully between aristocracy and oligarchy, always regarding the latter as a perverted form of aristocracy. Popular usage to-day, however, disregards the distinction, both having a bad signification. Some writers distinguish between aristocracy and oligarchy as follows: an aristocracy is a government by a class, while an oligarchy is a government by a small number of persons who do not necessarily constitute a class or system. Cf. Pradier-Fodéré, "Principes généraux," etc., p. 241.

[1] On the nature and kinds of democracy see Roscher, "Politik," pp. 308–454.

as monarchical or aristocratic.[1] Thus Sparta, Athens, Rome, Carthage, the United Netherlands, Venice, and Poland have all been described by political writers as republics, though none of them possessed that full representative character which we to-day consider to be the distinguishing mark of a republic. Rome, for example, was organized on a military basis, Venice was an oligarchy of hereditary nobles, Poland was a mixture of aristocracy and monarchy. France under the constitution of the year XII (Tit. I, sec. I) was styled a republic, though the chief of state bore the title and rank of emperor, and the crown was hereditary in the Napoleonic family.

What is Republican Government?

The constitution of the United States imposes upon the national government the duty of guaranteeing to the component states a republican form of government, but it does not attempt to define the essential characteristics of such a government, simply assuming that they are too well understood to admit of a difference of opinion. Madison in "The Federalist" said it was a government in which there was "a scheme of representation."[2] It was, he said, "a government which derives all its powers, directly or indirectly, from the great body of the people and is administered by persons holding their offices during

[1] "The Federalist," No. 39. Sir Henry Maine remarks that the term "republic" was once used to signify in a vague way a government of any sort which had no hereditary king, but which has come to have the added meaning of a government resting on a widely extended suffrage. "Popular Government," p. 198. Bluntschli observes in his "Politik" (pp. 295 ff.) that a republic may be understood in a wide and a narrow sense. In the wider sense we designate as republics all states in which the idea of the common good (*res publica*) prevails, that is, all states with public law (*jus publicum*). In this sense the natural law writers of the seventeenth and eighteenth centuries spoke of all free states as republics. In this sense, also, says Bluntschli, a government is republican where no one holds public power as a property right, where all power is exercised for the common good, where the inhabitants are subjects and free citizens at the same time, etc. In a narrower sense a republic is used in opposition to a monarchy. In this sense it has reference to a government exercised through a collection of persons, and is either an aristocracy or a democracy.

[2] "The Federalist," No. 10.

pleasure, for a limited period or during good behavior." [1] The two "great points of difference," said Madison, "between a republic and a democracy are: first, the governing power in a republic is delegated to a small number of citizens elected by the rest; and, second, a republic is capable of embracing a larger population and of extending over a wider area of territory than is a democracy. In a democracy the people meet and exercise the government in person; in a republic they assemble and administer it by their representative agents." [2] Madison rightly regarded hereditary tenures as inconsistent with modern notions of republican government, although he considered good behavior tenure for the judiciary at least admissible. It is also essential to the republican idea that the principle of representation shall be based upon a reasonably wide suffrage. A suffrage so restricted, for example, as that which existed in France under the restored monarchy (1814–1830), when the number of voters did not exceed 300,000 out of a total population of 10,000,000, would hardly be considered consistent with republican government.

Republics have been classified as aristocratic and democratic; [3] as monocratic and plutocratic; [4] unlimited, mixed, and limited; [5] as corporate, oligarchic, aristocratic, and dem-

[1] *Ibid.*, No. 39. A republic, says Jellinek, is the negation of monarchy. It is government, not by a single physical person, but by a collegial organization more or less numerous. The German Empire he describes as a republic rather than a monarchy because the highest *Staatsgewalt* is not in the hands of a single person ("Recht des mod. Staates," p. 695). Duguit, as we have seen, made the tenure of the chief of state the test of distinction between a monarchy and a republic; in the former the tenure is hereditary, in the latter elective ("Droit constitutionnel," p. 375). Bernatzik, as we have said, makes the distinction turn on the question of whether the head of the state has a subjective right to his office.

[2] "The Federalist," No. 14. It is clear that Madison here had in mind a pure rather than a representative democracy.

[3] Lewis, "Use and Abuse of Political Terms," p. 69; Montesquieu, bk. II, chs. 1 and 2; also bk. III, ch. 3.

[4] Gareis, "Allgemeine Staatslehre," in Marquardsen's "Handbuch," vol. I, p. 39.

[5] Martens, "Précis du Droit des Gens," vol. I, sec. 27.

ocratic;[1] as federal and confederate; as centralized and unitary; as hereditary and elective,[2] etc.

Criticism of Above Classification

The classification of governments as monarchies, aristocracies, and democracies has lost its former importance and now possesses little interest for the political scientist. To speak of a government as monarchical or aristocratic conveys little or no idea of its structural organization or processes of action. Many so-called monarchies are such only in name, and there is no fundamental difference in principle between aristocracies and democracies, the only distinction being one of degree. Such a classification puts governments as widely different as those of Great Britain, Prussia, Russia, and Turkey in the same class, others as different as those of France and the United States in another and the same class. It is necessary, therefore, to find other principles of classification in order to be able to classify governmental forms in any satisfactory or consistent manner.

IV. OTHER CLASSIFICATIONS; CABINET AND PRESIDENTIAL GOVERNMENT

Other Classifications

Montesquieu classified governments as republics, monarchies, and despotisms. He defined a republican government as one in which the whole body or a part of the people exercises supreme power; a monarchy as one in which a single person governs by fixed and established laws; a despotism as one in which a single person directs everything by his own will and caprice.[3] The principle underlying this classification is partly numbers and partly the spirit and character of the government. Woolsey classified governments as monarchies, aristocracies, democracies, and "compound states."[4] Other writers recognize

[1] Jellinek, "Recht des mod. Staates," p. 696.
[2] Martens, *op. cit.*, sec. 26.
[3] "Esprit des Lois," bk. II, chs. 1 and 2; also bk. III, ch. 3.
[4] "Political Science," vol. I, pp. 485 ff.

only two forms, namely, monarchies and republics, the latter comprehending both aristocracies and democracies.[1]

The fault with most classifications of governments is, as was said of the classifications of states, that they do not rest upon any consistent scientific principle which will serve as a basis for the differentiation of governments with respect to their fundamental characteristics. No single classification can be of much value; there must be as many classifications as there are points of view from which the government may be considered.

Suggested Principles of Classification

A well-known authority on political science adopts the following canons of distinction in classifying governmental forms: first, the identity or non-identity of the state with its government; second, the nature of the official tenure, including the method of constituting the official relation; third, the relation of the legislature to the executive; and fourth, the concentration or distribution of governmental power.[2]

Primary and Representative Governments

Upon the basis of the identity or non-identity of the state with the government, they may be classified as primary or representative. The pure democracy, where the citizens assemble in mass meeting and enact the laws of the state and frame administrative regulations, is, of course, the nearest approach to what we have called primary government. Where, on the other hand, the sovereign has delegated to an organ or organs the power to act for it in matters of government, as is now the almost universal practice, we have representative government in some form, though not necessarily popular government.[3]

[1] For example, Georg Meyer, Schulze, and Zacharia. Alexander Hamilton classified governments as democratic, aristocratic, monarchical, and mixed. "The Federalist," No. 9.

[2] Burgess, "Political Science and Constitutional Law," vol. II, bk. III, ch. 1.

[3] "We mean by representative government," said Lord Brougham ("British Constitution," Works, vol. XI, p. 89), "one in which the body of the people, either in whole or in a considerable proportion of the whole, elect their deputies to a chamber of their own." "A government is representative," said George Cornwall Lewis,

Hereditary and Elective Governments

Considered from the standpoint of the nature and source of the official tenure, governments may be classified as hereditary and elective. Hereditary government is that form in which the source of office is inheritance according to some rule or principle governing the transmission of political honors and titles. Elective government is that form in which the choice of those who exercise public power devolves upon the citizens or rather that portion of them who constitute the electoral body. The method of election may be direct, or, as is sometimes said, election in the first degree; or it may be indirect, or in the second degree. In either case it may be by an electorate constituted on the basis of a restricted suffrage or by one on the basis of what is popularly designated as universal suffrage.

With respect to the relation of the executive to the legislature, governments may be classified as cabinet (the terms "ministerial," "parliamentary," and "responsible" are sometimes preferred); and what, for lack of a more suitable term, has been called presidential or congressional government.

Cabinet Government

Cabinet government is that system in which the real executive — the cabinet or ministry — is immediately and legally responsible to the legislature or one branch of it (usually the more popular chamber) for its legislative and administrative acts, and mediately or politically responsible to the electorate; while the titular or nominal executive — the chief of state — occupies a position of irresponsibility.[1] The members of the ministry are

"when a certain portion of the community, generally consisting either of all the males — or of a part of them, determined according to some qualification of property, residence, or other accident — have the right of voting at certain intervals of time for the election of particular members of the sovereign legislative body." "Use and Abuse of Political Terms," p. 107.

[1] Recently the idea has begun to take root in England that the cabinet is *immediately* responsible to the electorate and only secondarily responsible to the House of Commons. Only on this principle can we explain the resignation of the Balfour Cabinet in 1905, at a time when it still retained a large majority in the House of

usually members of the legislature and the leaders of the party in the majority, but whether they are members or not, they have the privilege of occupying seats therein and of participating in the deliberations.[1] In short, the ministerial office is not incompatible with legislative mandate. On the contrary, the cabinet system presupposes the double character of minister and member, and thus executive and legislative functions are inextricably commingled. "There is," observes Courtenay Ilbert, "no such separation between the executive and legislative powers as that which forms the distinguishing mark of the American Constitution" but the relation is one of intimacy and interdependence.[2] The nominal or titular executive, according to a legal fiction, is incapable of doing wrong, in a political sense, and is, as it were, under the guardianship of his ministers, who assume the responsibility for his official acts. Collectively they constitute the "government"; they prepare, initiate, and urge the adoption by the legislature of all the more important legisla-

Commons. I am indebted to Professor W. J. Shepard for calling my attention to this tendency.

[1] The English make a distinction between the ministry and the cabinet. The ministers — some forty or more in number — are the chiefs of the executive departments, among which the administration of the country is divided, including also the parliamentary undersecretaries who are not heads of departments. The cabinet, on the contrary, is simply "those members of the King's ministry who are summoned (by the Prime Minister) to attend cabinet meetings" (Ilbert in Redlich's, "Parliamentary Procedure," vol. I, p. 13). There are usually some eighteen or twenty of these. In a large sense the ministry embraces all the political functionaries charged with the direction of public affairs who hold their positions only during the existence of the cabinet. From all these a committee called the cabinet is chosen. Generally there are a few ministers in charge of departments that have no real existence. They are usually experienced statesmen who have been introduced into the ministry for the sake of their advice. For different grades of ministers and undersecretaries, see Dupriez, "Les Ministres dans les Pays principaux d'Europe et d'Amérique," vol. I, p. 36; Todd, "Parliamentary Government in Great Britain," vol. I, p. 179; and Duguit, "Droit constitutionnel," pp. 1037–1038. On the office of undersecretary of state, see Claviéres, "Les sous-secrétaires d'État" (Paris, 1901), and Sivian, *ibid.* (Paris, 1902).

[2] Redlich, "Parliamentary Procedure," I, XII.

tive projects; and from their seats in the legislature they defend their policies from attack, and when called upon must give an account of their official conduct. They are the heads of the great administrative departments as well as the political chiefs and parliamentary leaders of the country, and are charged with administering the laws which they propose and have enacted. So long as their policies and official conduct command the support of the majority of the members of the legislature, or rather of that chamber to which they are responsible, they continue to hold the reins of office and govern the country. But as soon as the legislature manifests in no uncertain language its want of confidence in the ministry, through a vote of censure or by a refusal to pass its measures, the ministry either resigns office in a body or it dissolves the chamber to which it owes responsibility, orders a new parliamentary election, and appeals to the electorate to sustain it by returning a new parliament which is in sympathy with its policies and acts. If the results of the election are favorable to the ministry, it continues in office; if adverse, it resigns as soon as the results are fully known or when the new parliament has assembled and by positive vote has made known its want of sympathy. In a typical cabinet system like that of Great Britain the ministry is taken wholly from the ranks of the party having a majority in the popular chamber, and thus possesses the character of homogeneity. In legal theory the ministers are chosen by the nominal or titular executive, though where the system of responsibility to the legislature is fully developed they are in reality chosen by the legislature, and the designation by the chief of state is little more than a ceremonial function of investing them with the symbols of office.[1] The number of ministers is rarely fixed either

[1] It is not to be inferred from what is said above in regard to the position of the crown under the cabinet system of government that it necessarily plays an insignificant part. A respected sovereign largely controls his ministers by his influence.

by law or by custom, and hence the size of the ministry is uncertain and variable, the exact number in any case being usually determined by the premier or by executive decree. In Great Britain the number (*i.e.* of the cabinet) in recent years has been in the neighborhood of twenty; in France, it is now twelve; in Italy, eleven; in Belgium, ten.

Spread of Cabinet Government

The cabinet system originated in England and was the product of history rather than of invention. From England it spread little by little to Holland, France, Belgium, Roumania, Sweden, Norway, Denmark, and the British Colonies, until it has become, says Esmein, "the principal system of government in the world." [1] It has made little headway in Germany, however, and none at all in Switzerland or North America, and but little in Latin America. The cabinet system has received its fullest development in Great Britain, and there its workings have been attended with the most satisfactory results.

Cabinet Government in Belgium

Among the cabinet systems of the continent, that of Belgium most nearly resembles the British system, though the crown plays a more important rôle in that country than in England. The responsibility of ministers to the king is more real than in England, and he may direct and dismiss them with more freedom than the British sovereign may.[2] As there are generally recognized par-

If their decisions seem impolitic or dangerous, he is often able to persuade them to change their policy. His power to dismiss them and appeal to the people gives him a strong defense against their misconduct as well as that of the legislature. Such a power is essential to successful parliamentary government. Without it a legislature with which the people are no longer in sympathy might not only annihilate the executive, but impose upon them a government repugnant to their sense of right and justice. On the influence of the crown under the cabinet system in England, see Bagehot, "The English Constitution," chs. 2 and 3; and Todd, "Parliamentary Government," ch. 4.

[1] "Droit constitutionnel," p. 111. For discussions of the merits and demerits of cabinet government, see Esmein, *op. cit.*, ch. 5, especially pp. 168–178; Sidgwick, "Elements of Politics," p. 443 ff.; Duguit, "Droit constitutionnel," sec. 61; Laveleye, "Le Gouvernement dans la Démocratie," vol. II, bk. 10, chs. 1–2.

[2] Dupriez, "Les Ministres dans les Pays principaux," vol. I, p. 215.

liamentary leaders, the king rarely has any real choice, however, in the selection of his ministers.[1] In Belgium, as in England, ministers without portfolios are sometimes appointed as a means of introducing into the government eminent persons whose support and experience the government desires to avail itself of, yet who would hesitate to assume the burden of a cabinet portfolio. As in England, ministers are chosen not from the ranks of technical administrators, except in the case of the minister of war, who is always a soldier and usually an active general, but from the members of parliament and from the chamber of deputies rather than from the senators. All ministers, whether members or not, have full *entrée* into either chamber.

Cabinet Government in France

Cabinet government was introduced in France by the charter of 1814; it became fully established under the July monarchy, was practically abandoned in 1848, but was reëstablished with the third republic, though it has never attained the success there that it has in England. In France there is no incompatibility whatever between ministerial office and legislative mandate, and neither law nor custom requires a member of parliament appointed to the cabinet to resign his seat and seek a reëlection, as is the rule in England. Custom now requires that all cabinet portfolios shall be given to members of parliament, though until recently this rule did not apply to the ministers of war and marine.[2] The English and Belgian practice of appointing ministers without portfolios has not been followed in France since 1868, though undersecretaries are sometimes appointed, there being four

[1] Dupriez, "Les Ministres dans les Pays principaux," vol. I, p. 212.

[2] Dupriez, vol. II, p. 336. The present premier, however, in appointing General Brun to the ministry of war and Admiral de la Payrere to the ministry of marine, has returned to the earlier practice of selecting professional military and naval commanders respectively for these offices rather than civilians who are members of the legislature. For a good brief review of the French system, see Duguit, "Droit constitutionnel," sec. 61; also sec. 144.

such at the present time. Ministers are usually regarded as being responsible to the chamber of deputies only, though the constitutional law of February 25, 1875, expressly declares that they shall be solidly responsible to the *chambers* for the general policy of the government and individually responsible for their personal acts.[1] In legal theory they are appointed by the president of the republic, but in fact circumstances usually determine who shall be members, so that the president has little freedom of choice. Owing to the existence of many groups in France the task of constructing a cabinet is often one of great difficulty. Hardly any single group or coalition of groups ever possesses a majority in the popular chamber, and it not infrequently happens that there is no recognized leader to whom the chief of state may turn and intrust the task of constituting the cabinet.[2] Under such circumstances the premier is sought from the old cabinet which has been condemned.[3] Consequently it nearly always happens that a new cabinet in France contains several members of the old one, a condition that almost never happens in England, especially when there has been a change of parties. The principal difficulty encountered in constructing a stable cabinet in France arises from the necessity of giving the different groups a sufficient number of members so as to satisfy them.[4] This requires

[1] The view that the ministry is responsible to the senate as well as to the chamber of deputies is ably maintained by Duguit ("Droit const.," p. 1070), but is denied by Esmein ("Droit const.," 4th ed., p. 688). As a matter of fact French ministries have on several occasions been forced to resign by the hostile attitude of the senate. For a discussion of the particular instances, see Duguit, p. 1073; Lowell, "Government of England," vol. I, pp. 22 ff.; and Perrin, "De la Responsabilité penale du Chef de l'État," etc., p. 45.

[2] Compare Esmein, "Droit constitutionnel," pp. 168–178; Dupriez, vol. II, pp. 337 ff.

[3] Dupriez remarks that of the eighteen ministries which ruled France from the establishment of the Third Republic down to 1893, seven were presided over by premiers who were members of preceding cabinets. *Op. cit.*, p. 337.

[4] See Dupriez, vol. I, pp. 340–344.

skill and tact, and even when the task is well done such a ministry is weak and unstable because it is heterogeneous instead of homogeneous. Where there are more than two political parties in a state having the cabinet system of government, coalition cabinets, with their traditional weakness and instability, are inevitable. They are weak and unstable because it is next to impossible for a ministry representing such widely different interests to pursue a common policy for any great length of time. The result is that ministries are short-lived in France and cabinet government has not produced satisfactory results.[1]

Cabinet Government in Italy

In Italy the conditions under which cabinet government is conducted are similar in many respects to those prevailing in France. As in France, the chambers are always divided into a number of political groups or factions, unstable, but sharply differentiated and well-disciplined. Under such circumstances it is difficult for one man to rally the support of a majority to any measure concerning which there is any considerable opposition. Enormous difficulties, even more so than in France, are consequently encountered in forming a cabinet. Hardly any leaders are designated by circumstances as the representatives of public opinion, and hence there is no certainty that the ministerial leaders chosen will be able to command the support of the chamber on any measure. As in France, widely different groups must be given representation in the cabinet, and each must be placated whenever it shows signs of disaffection. Cabinets formed after long and laborious negotiations, says Dupriez, sometimes go to pieces over the first question which provokes

[1] For a contrary view, however, see an article by J. T. Shotwell, entitled "The Political Capacity of the French," in the "Political Science Quarterly," vol. XXIV, no. 1. Since 1879 there have been no less than thirty-six ministries in France, and during the last two decades there have been on an average about two premiers every year.

debate.[1] The Italian parliamentary system differs in some particulars from both those of England and of France. In the first place, the action of the chamber in determining the selection of the ministers is less than it is in either England or France. In Italy the king enjoys a much larger freedom and discretion in choosing his ministers, a fact which sometimes leads to the "disorganization and confusion of the parliamentary assembly." In theory the cabinet is responsible to the king and the parliament combined, but the parliament, we are told, has "obsequiously surrendered its powers of control, so that the responsibility is now due mainly to the king."[2] The ministers are generally taken from the chamber of deputies, the premier practically always.[3] The ministers of war and marine are usually army and navy officers respectively, and if not already senators, they are made such by royal appointment at the time they are chosen to the cabinet. Ministers without portfolios are sometimes appointed, and since 1888 each minister has had under his control an undersecretary, who takes no part in the deliberations of the cabinet, but may represent the minister before the chamber and defend the acts of the government.[4]

The German System

In Germany there exists what may be called ministerial, but not parliamentary, responsible government. Both in the imperial and state governments ministers are appointed by the executive without reference to the political complexion of the legislature or without regard to the wishes of the

[1] "Les Ministres," etc., vol. I, p. 287.

[2] This is the view of Dupriez (vol. I, p. 287) — a view which seems a little extreme. The king, it is quite true, exercises a more important rôle in the selection of ministers than in England, but there are limitations on his choice, and strong party leaders, like Giolitti and Sonino, have been practically forced upon him. In actual practice, moreover, the responsibility of the ministers is primarily to the legislature rather than to the king.

[3] Only once since 1848 has the premier been a senator.

[4] Dupriez, vol. I, p. 282.

majority. In short, the executive is free to choose whom he will. Technical administrative experts who have had long experience in the service and have risen by degrees to be heads of departments, rather than parliamentary leaders or political chiefs, are usually preferred. They are not generally required by the constitution to be taken from either chamber, though, whether members or not, they are given *entrée* thereto with the right of debate. They are not chosen exclusively from one or the other party, though certain groups are usually recognized in the construction of a cabinet, for homogeneity is not considered a necessity.[1] Legally and theoretically they owe no responsibility to parliament, but are responsible for their acts only to the king or the prince who appointed them.[2] Their tenure, legally speaking, is dependent upon the royal favor and not upon the will of either chamber. The policies of state are determined by the king and carried out by the ministers, who are theoretically at least the servants of the royal will.[3] Generally, in cabinet governments, the rôle of the cabinet is not determined by positive law, but by usage and custom. In Prussia, however, this is not the practice. There the relations between king and ministers, between the ministers themselves, their control over the administration, etc., are all fixed by royal ordinances. There is no such officer as prime minister

[1] Dupriez, vol. I, p. 363. See also Passow, "Die Ministerverantwortlichkeit in den deutschen Einzelstaaten."

[2] Nevertheless recent events in Germany show a tendency in the direction of responsibility to the legislature. Chancellor von Bülow's virtual admission on the occasion of the publication of the Emperor's interview with an Englishman in 1908, that the defeat of the government by the *Reichstag* would make his resignation a practical necessity, was accepted by the liberal leaders as an important step in the direction of the establishment of ministerial responsibility to the popular chamber, and when the chancellor subsequently resigned on the defeat of his budgetary proposals, the principle was given additional sanction.

[3] The Prussian theory and practice in this point is well stated by Bismarck in a speech delivered in the *Reichstag* on Jan. 24, 1882, and quoted in part in Dupriez, vol. I, p. 363.

who exercises the power of direction over his subordinates, though there is a minister-president who acts as a moderator during the absence of the king, and who frequently presides over the meetings of the cabinet.[1]

Parliamentary Republics

Cabinet government is most commonly found in so-called monarchical states, where the conditions most favorable to its success are more generally present than elsewhere. Nevertheless it is sometimes found in republics, particularly those like France, in which monarchical traditions are strong. It has also been introduced into some of the Latin-American republics, notably Chile, Haiti, San Domingo, and Venezuela; but in none of them has the system received anything like a perfect development or attained any high degree of success.[2]

Presidential Government

Presidential government as contradistinguished from cabinet or parliamentary government is that form in which

[1] For a comparison of the offices of prime minister in England and minister-president in Prussia, see Dupriez, vol. I, pp. 369–370.

[2] Of the twenty-two republics listed in the "Statesman's Yearbook" only the five mentioned have governments in which the ministers are responsible to the legislature. Only in the United States, Brazil, and Venezuela, however, are the ministerial office and legislative mandate incompatible. In all the republics except these three, cabinet members have *entrée* into the legislature. In view of the fact that in Venezuela ministers may not occupy seats in the legislature, it may be questioned whether the cabinet system is really in force there, since the *entrée* of the ministers into the chambers is considered by some writers as an essential element in cabinet government. Sidney Low, for example, in his "Governance of England," goes to the extent of saying that "the root of the whole parliamentary form of government is that ministers must be members of parliament." On this subject of cabinet government in republics, see the recent work of Carette, "Les Républiques parlementaires" (1906). On the subject of parliamentary or cabinet government in general, see Combothecra, "Essai sur le Régime parlementaire"; Esmein, "Droit constitutionnel," chs. 4 and 5, also an article by the same author entitled "Deux formes de Gouvernement," in the "Revue du Droit public et de la Science politique," February, 1894; Blauvelt, "Development of Cabinet Government in England"; Jenks, "Parliamentary England"; Dupriez, *op. cit.;* Lowell, "Essays in American Government," chapter on "Cabinet Responsibility"; Bradford, "Lessons of Popular Government," vol. II, ch. 30; Snow, "Cabinet Government," in the "Annals of the American Academy of Political and Social Science," July, 1892; Todd, "Parliamentary Government in England," vol. I, chs. 2–5; Duguit, "Droit constitutionnel," secs. 61 and 144.

the executive is constitutionally independent of the legislature as regards his tenure and to a large extent also as regards his policies and acts. The executive may be, and generally is, responsible to the legislature or one chamber of it for certain grave crimes and sometimes even for lesser offenses, and may be impeached and upon conviction be removed from office; but he is politically irresponsible to the legislature and cannot be removed from office except upon impeachment. This is the system which prevails in the United States, both in the national and local governments, in Switzerland, and in most of the Latin-American republics, and in a modified form in Germany. Where the presidential system prevails, no distinction exists between what we have denominated the titular or nominal executive and the real or actual executive. There are ministers upon whom the chief work of the administration devolves, to be sure, but they are not members of the legislature and rarely have *entrée* to either chamber; they do not assume responsibility for the acts of the executive; they are appointed by the executive without regard to the political complexion of the legislature or the wishes of the majority in control of either chamber; they are, within the limits of the law, controlled and directed by the executive and may be dismissed by him at will. They are, in short, the ministers of the executive, not of the legislature, administrative chiefs rather than parliamentary leaders. They neither prepare, introduce, nor advocate before the chambers the adoption of legislative measures, except in so far as they may do so through the agency of members of the legislature who are in sympathy with their policies. Votes of censure or of want of confidence by the legislature do not affect them, and when the legislature refuses to enact the measures which they suggest, instead of resigning they continue to govern as though they were in complete harmony with the majority. It not infrequently happens, of course, that

they belong to a different political party from that which is in control of one or both of the chambers of the legislature, in which case the presidential system would break down were their tenure dependent upon the support of the majority. From this it will be seen that the one feature which distinguishes presidential government from the parliamentary or cabinet system is the almost complete isolation of the executive branch from the legislature, and its independence of the same body in respect to its tenure and powers.[1]

III. UNITARY, FEDERAL, AND CONFEDERATE GOVERNMENT

Unitary Government

Considered from the point of view of the concentration or distribution of power, governments may be classified as unitary and federal. If the powers of government are concentrated in one supreme organ or organs that are located at one common center, and from which all local governing authorities derive their existence and powers, the government is both unitary and centralized. In such a system there is a single common source of authority, and hence but one supreme will is exerted. For convenience of administration the territory of the state may be subdivided into circumscriptions or districts, in each of which a local government may be established and to which certain powers of a local character may be delegated by the central government; but so long as the local organizations are the mere creations of the central power and exist at its will and derive their powers from it and it alone, the gov-

[1] For an argument in favor of allowing the heads of departments of the United States government seats in Congress and of making them politically responsible to Congress, see Bradford, "Lessons of Popular Government," vol. II, ch. 30. For an argument against such a proposition, see an article by Freeman Snow in the "Annals of the American Academy of Political and Social Science," July, 1892. The subject is also discussed by Lowell in his "Essays on Government," chapter on "Cabinet Responsibility." See also Wilson, "Congressional Government," ch. 5.

ernmental system is unitary in character. These local organizations are nothing more than parts of the central government, created to act as its agents; in short, they have no independent wills of their own. In such a system there is no local self-government existing independently of the will of the central government, but only such as the latter may choose to allow. Examples of such systems of government are those of England, France, Spain, Portugal, Italy, and most of the other states of Europe. In none of them do we find a constitutional distribution of powers between a central government and a number of local governments, each with a constitution and political organization of its own creation. There are local governments, to be sure, such, for example, as the counties in England, the departments and communes in France, the provinces in Belgium and Italy, etc.; but all such governments are nothing but the creatures and agents of the central authorities and enjoy little or no constitutional protection against central interference and control.

Federal Government

If, on the contrary, the government of the country is distributed by the constitution between a central organization and a number of local organizations, the latter of which are not ordinarily the creatures or agents of the former, but owe their existence to the general constitution in the sense that their spheres are determined by it, the government is said to be federal in character. Federal government may be defined as a system of central and local government combined under a common sovereignty, both the central and local organizations being supreme within definite spheres, marked out for them by the general constitution. It is dual government as contradistinguished from unitary government, and implies local self-government as opposed to centralized government. It represents a sort of compromise between unitary government and confederate government. Contrary to the principle which underlies unitary government, the

local organizations under the federal system are not the direct creations of the central government; but in most federal systems the reverse is true, that is, the central government has been created by the local organizations through the act of federation. The territorial areas of these local organizations are not therefore mere administrative districts, but autonomous and, in a certain sense, self-created political communities, having their own constitutions and political systems. The central and local governments are not, however, totally separate and disconnected from each other in organization. Federal government is not, as is often loosely said, the central government alone, but it is a system composed of the central and local governments combined. The local governments are as much a part of the federal system as the central government is, though neither is subject to the control of the other. In most federal systems the component parts participate in the organization of the central government. In the German Empire and the United States, for example, the upper chambers of the national legislature are composed of members chosen by a branch of the state government rather than by the people. Thus a connecting link between the central and local governments is established, which serves to minimize the tendency to mutual jealousy and to strengthen good feeling between them.[1]

Distribution of Powers in a Federal System

The principle upon which the powers of government are distributed between the central and local organizations in a federal system is, that those affairs which are of common interest to all the component parts of the federation and which require uniformity of regulation should be placed under the control of the central government, while all matters not of common concern should be left to the care

[1] This was dwelt upon by Hamilton in "The Federalist," No. 62. See also Haynes, "The Election of Senators," pp. 12–13; and Sidgwick, "Elements of Politics," p. 535.

of the local governments.[1] In short, there should be one government for national affairs and a number of local governments for local affairs. In respect to the former, therefore, federal government resembles unitary government, while in respect to the latter it is more like confederate government. Opinions differ, however, as to what affairs require uniformity of regulation and what should be left to local regulation, and hence the line of separation between general and local matters is in practice drawn differently in different federal systems. In most states having the federal form of government, however, such affairs as foreign relations and international intercourse, war and peace, interstate and foreign commerce, coinage of money, patents and copyrights, have been placed under the control of the central government. In international relations the local governments are non-entities and are officially unknown, though, as will be pointed out later, they have shown themselves able in certain instances to interpose obstacles in the way of the successful prosecution of a common foreign policy by the central government.[2] In the more recently established federal systems of Europe and Latin-America the notion of what requires uniformity of regulation and what will permit of variety of control is somewhat different from that which has prevailed in the United States, and, consequently, the principle of distribution has been different. In these states many affairs are treated as being of general interest and hence requiring uniformity of regula-

[1] Compare Dicey, "Law of the Constitution," p. 131; and Freeman, "History of Federal Government," pp. 3–4. It may be noted in this connection that in Germany the division of powers between the imperial and state governments is not the same in the domains of legislation and administration. In legislative matters the competence of the Empire is much wider than it is in regard to administration since the execution of the imperial laws devolves for the most part upon the governments of the individual states, as was pointed out in the preceding chapter.

[2] In Germany and Switzerland, on the contrary, the local organizations have a limited power of foreign intercourse, and some of the German states also retain the right of coinage.

tion, which in the United States are left to local regulation. Thus, in Canada and the German Empire the whole body of civil, criminal, and commercial law and the law of procedure, as well as the law of marriage and divorce, is national, not local; that is, instead of separate and widely varying legal systems in these domains, there is a single uniform code for all the component parts of the empire. The evils that have arisen in the United States in consequence of the extraordinary variety of legislation, especially in respect to certain businesses and occupations that are really national in scope rather than local, have recently aroused discussion in many quarters in favor of increasing the powers of the national government along various lines.[1]

Methods of distributing the Powers of Government

Two methods have been followed in distributing the powers of government between the central and local organizations, where the federal system prevails. In most such states the powers intrusted to the central government are specifically enumerated. To the local governments are reserved all the remaining powers except such as may be specifically prohibited. The central government is thus an authority of delegated powers, while the local governments are authorities of residuary powers. In other words, the competence of the central government is *positively* determined by the constitution, while that of the local governments is *negatively* determined. The presumption of law in case of doubt, therefore, is against the existence of any power claimed by the central government and in favor of any power claimed by the local governments. In the federal system of Canada, however, a somewhat different principle of distribution prevails. There the local governments are authorities of delegated powers, while the central government is one of both delegated and reserved powers.[2] Whatever may be the method or principle of

[1] See an address by Elihu Root entitled "The States, how to Preserve them."

[2] British North America Act, secs. 91–92; Munro, "Government of Canada," especially chs. 22 and 23.

distribution, or the nature and extent of power delegated or reserved to either government, neither may enlarge its competence or distribute the powers of government differently from the way in which they have been distributed by the constitution. Only the sovereign itself can do that. In some federal systems, however, the central government is given a limited control over the organization and acts of the local governments. Thus, in the United States it is made the duty of the national government to see that only republican governments shall be maintained by the individual states, from which it may be inferred that the national government may prohibit such local organizations as may not in its judgment conform to this requirement. In Canada the Dominion government has the power to disallow the acts of the provincial legislatures; likewise in the federal republic of Venezuela the national government may veto the acts of the local legislatures. Both in Germany and Switzerland the central authorities have a sort of *jus suprema inspectionis* over the operations of the local governments, especially when they are charged with carrying out the acts of the central government. In the German Empire the imperial government may by the process of federal execution compel a delinquent or recalcitrant member of the empire to perform its obligations to the empire.

Confederate Government

Confederate government is that form of government in which, as to territory and population, the state is coextensive in its own organization with the organization of the local government.[1] In a confederate system, as in the federal system, there is a central organization; but instead of a single sovereignty there are as many sovereignties as there are local governments. The central government is merely the agent of the states composing the confederacy, and its jurisdiction is limited to a very few concerns. In operation its commands extend, as has been said, not to the individ-

[1] Burgess, *op. cit.*, vol. II, p. 6.

uals who inhabit the confederacy, but are addressed to the confederated states themselves and reach the individuals for whom they are intended only mediately and indirectly, through the medium of the state organizations. A confederacy in reality has no citizens or subjects who owe it direct and immediate allegiance. Its jurisdiction generally includes only such matters as relate to foreign relations, defensive war, and possibly a few matters of an interstate character. Usually it possesses no power over the sources of its own revenue supply, but is dependent upon the voluntary contributions of the confederated states. Finally, it lacks stability and permanence, and its existence is precarious, since it belongs to the component members to withdraw from the confederation at will or refuse to be bound by its acts and resolutions. It is a transitory form of political organization which usually develops into the federal system or dissolves into its constituent elements.

IV. BUREAUCRATIC *VERSUS* POPULAR GOVERNMENT

Bureaucratic Government

From the standpoint of the organization and spirit of the administrative service, governments may be classified as *bureaucratic* and *popular*. A bureaucratic government is one which is composed of administrators especially trained for the public service, who enter the employ of the government only after a regular course of study and examination, and who serve usually during good behavior and retire on pensions. Under such a system the governmental service acquires the character of a profession, its officials are subject to a rigid discipline, and they tend to acquire an *esprit de corps* somewhat similar to that found among the soldiers of a regular army. They devote their entire time to the discharge of their public duties and have no other occupation.[1] They therefore tend to become a class

[1] Compare Goodnow, "Comparative Administrative Law," vol. II, p. 8; and Bagehot, "The English Constitution" (American ed.), pp. 260–266. Strictly

apart from the rest of the population, possessing different ideals and interests. In a large measure such government is irresponsible to the people, and is little affected by public opinion — it is, in short, very largely a government of men rather than of laws. It is marked by an excessive formalism, is inclined to parade and pomp, and has a tendency to overemphasize administrative routine rather than conditions and principles — in short, it tends, as Burke remarked, to think more of forms than of substance. The most extreme example of a bureaucracy which the world has seen in modern times, perhaps, was that which existed in Prussia from 1720 to 1808. A bureaucracy of a less absolute character was that which existed in France under Napoleon for a time after 1808. In varying degrees of development it exists to-day in all the so-called monarchical states of Europe, especially in Prussia and Russia, and to a less degree in England. Commonly thought of only in connection with monarchical states, its forms and methods, and to some extent its spirit, are, nevertheless, found in the governmental systems of many republican states as well.[1]

Merits of the Bureaucratic System

The chief merit of bureaucratic government is that it represents high skill and ability. Its officials are specially trained for the public service. It is thus more efficient than popular government; and if skilled, efficient, and economic administration were the only or the main end of government, little fault could be found with such a system. "It accumulates experience," says John Stuart Mill, "acquires well-tried and well-considered traditional maxims

speaking, the distinction between bureaucratic and popular government is not so much one of form as of spirit, but I have treated it in this chapter through considerations of convenience rather than of logic.

[1] On bureaucratic government, see Brater and Bluntschli, "Deutsches Staatswörterbuch," vol. II, pp. 293–297 (art. "Bureaukratie"); Goodnow, *op. cit.*, vol. II. pp. 8–9; Mill, "Representative Government," pp. 109–110; Block, "Dictionnaire de la Politique," vol. I, pp. 271–275; and Bachem, "Staatslexikon," vol. I, pp. 1070–1078.

and makes provision for appropriate practical knowledge in those who have the actual conduct of affairs."[1]

Its Defects

But as we have attempted to show, efficiency of administration is not the sole end to be attained in any governmental system. The education of the people in political matters, the stimulation of popular interest in public affairs, and the cultivation of loyalty and patriotism on the part of the masses should be among the important aims of every political system, and this cannot be accomplished by the bureaucratic system. It is not favorable to the development of patriotism, self-reliance, or loyalty. Moreover, it is not without defects inherent in its own nature. "The disease," said Mill, "which afflicts bureaucratic governments and of which they die is routine. They perish by the mutability of their maxims and still more by the universal law that whatever becomes a routine loses its vital principle." Such a government, he said, tends to become a "pedantocracy." It is the only government, some one has remarked, for which the philosopher can find no defense.[2]

Popular Government

Contradistinguished from bureaucratic government is popular government, that is, government by persons drawn at regular intervals from the ranks of the people, who after a brief service return to the private walks of life. Generally they are without special training; not infrequently they serve without pecuniary compensation; and often they are during the term of their public service engaged in other occupations. Under such a system most of the offices are open to all without preliminary preparation or examination; few or no professional qualifications are required, and the official class never develops a caste system or loses touch with the people. The officers are more or less influenced by public opinion, and in the dis-

[1] "Representative Government" (Universal Library edition), p. 109.

[2] *Ibid.*, p. 110. See also F. Röhmer, "Deutschlands alte und neue Bureaukratie"; also article "Bureaukratie" in Brockhaus, "Konversations-Lexikon."

charge of their duties are more often subject to legislative than administrative control.

Individualistic Government

Finally, from the point of view of their functions and sphere of activity, governments may be denominated as *individualistic* and *paternal*.[1] A government of the former type is one whose activities are limited mainly to the simple police functions of maintaining the peace, order, and security of society and the protection of private rights. A

Paternal Government

paternal government is one whose functions are not limited merely to restraining wrong-doing and the protection of private rights, but which goes farther and endeavors to promote by various means the social well-being of the people. It undertakes to perform for society many services which might be performed as easily through private initiative, on the ground that they can be more efficiently and economically done by the government than by private individuals. Such a government may own and operate various industries, conduct businesses like insurance, provide pensions for the old, the sick, and the infirm, and in various ways care for the social interests of the people.

V. SUCCESSION OF GOVERNMENTAL FORMS

Governmental Transformations

No state has retained the same form of government throughout its whole history. Governments, like living beings, are constantly changing their forms so as to adapt themselves to the altered conditions of a new environment. Thus, Athens was first ruled by kings, then by an aristocracy, later by tyrants, then by a democracy, and finally again by kings. So Rome went through a circle of political transformations. It began as a city kingdom, then it became a republic, and finally an empire ruled by Cæsar. The government of France within half a century passed

[1] What was said above in regard to the distinction between bureaucratic and popular government and the reason for treating the subject here applies equally to the distinction between individualistic and paternal government.

through the forms of an absolute monarchy, a republic, an empire, a kingdom, again a republic, again an empire, and for the third time a republic.

Early Ideas as to the Order of Succession

Many of the early writers undertook to reduce the successive transformations through which governments pass to a regularly ordered sequence or rule of general application. There existed in early times a popular belief that there was a natural order of political development through which all states must pass in the course of their history. Plato, for example, taught that the natural course of evolution was from aristocracy, the rule of the best, to timocracy, the rule of the military, then to oligarchy, then to the rule of the mob, and finally to tyranny.[1] Aristotle, while differing from Plato as to the order of development, nevertheless believed that forms of government followed one another according to a regular order of succession. According to his rule the state began as a hereditary monarchy, which in time passed into an aristocracy. The latter in the course of time became an oligarchy, the oligarchy became a tyranny, and the latter ultimately passed into a democracy. Ordinarily after an unsatisfactory experience with democracy a monarchy would be reëstablished, and the cycle thus begun again would be passed through as before.[2] Polybius taught that in the beginning the strongest person physically in the state ruled, that is, the state began originally as a monarchy. Then followed a period when justice rather than physical power became the basis of the right to rule, during which time a form of government called by Polybius "royalty" (*Basileia*) prevailed. This form in time degenerated into tyranny, only to be overthrown eventually, and an aristocracy set up in its place. This in the course of time was succeeded by oligarchy, which in turn was overthrown by the people and a democracy was established.[3] Machiavelli laid down almost the same rule regarding the

[1] "The Republic," bk. VIII. [2] See his "Politics," bk. VI.
[3] Livius, vol. I, p. 2.

order of natural succession in respect to the political forms of ancient states.

Schleiermacher's Theory

The noted German scholar Schleiermacher asserted that political transformations are determined largely by the spread of political self-consciousness. At first, he said, political consciousness was not highly developed in any minds, though diffused equally among the masses. The democratic form of government naturally corresponded to this condition and was therefore the first state form. In the course of time a higher state consciousness developed and concentrated itself in a few minds. This led to the establishment of aristocracy. Finally the state consciousness concentrated itself in a single individual, and monarchy, the highest form of state, succeeded.[1] There is a residuum of truth in the principle of Schleiermacher's law, but the weight of opinion is against the order in which he conceived political consciousness to have spread. It is more reasonable to believe that it existed at first in but one or at best only a very few minds, and that it grew and spread slowly and became diffused throughout the mass of the population rather late in the life of the state. It seems more probable, therefore, that the order of succession was the reverse of that which Schleiermacher laid down; that is, the state began with a monarchical form of organization, which in time became aristocratic, and finally, when political consciousness became general, the organization of the state became democratic. History, indeed, shows that this has generally been the order of development.[2]

[1] See his "Über die verschiedenen Staatsformen." For a criticism of Schleiermacher's doctrine see Bluntschli, "Politik," pp. 309 ff.

[2] Compare Batbie, "Traité de Droit public et administratif," vol. I, ch. 35. This author considers at length the succession and kinds of state forms and shows that generally, though not always, of course, monarchy, aristocracy, and democracy have followed each other in the order mentioned. The necessities of self-defense give rise, he says, to the first form of political organization, namely, a military monarchy. After the struggle which has produced it is over, the organization becomes aristo-

Bluntschli's Theory

Bluntschli, a critic of Schleiermacher, held that the normal forms of government succeeded each other in the following order: first, theocracy; second, monarchy; third, aristocracy; and fourth, democracy; while the abnormal forms succeeded each other in the following order: hierarchy, tyranny, oligarchy, and ochlocracy. Each of these forms not infrequently passed through several transformations. For example, monarchy began in its pure form, then it became aristocratic (*ständische*) in character, and finally, democratic. Republics likewise passed through monarchical, aristocratic, and democratic stages.[1]

No Law of Succession in Political Transformations

Regarding the merits of the rule laid down by the early writers in respect to the succession of state forms, there can be but one conclusion, namely, that such changes do not follow each other in accordance with any law such as reigns in the physical world. History furnishes abundant evidence of this truth. For example, the early monarchies did not always pass into tyrannies, but often the latter resulted from strife among the leaders of an aristocracy. Not infrequently monarchies have been transformed into democracies, aristocracies into monarchies, and democracies into aristocracies. Bodin, in his treatise on the republic, gives numerous historical examples of such transformations. In modern times monarchies have more often been succeeded by democracies than by aristocracies. During the sixteenth and seventeenth centuries in many states of Europe monarchical governments of an absolute type were erected upon the ruins of feudal aristocracies. A study of the subject indeed will show that the exceptions are more numerous than the rule. There are, of course, certain laws of political evolution, but no such sequence of succession as was described by the early writers. Not all states have passed through the same stages

cratic. Finally the masses demand and obtain a share in the management of public affairs, and the government becomes democratic in organization.

[1] "Politik," pp. 310–312; see also his "Allgemeine Staatslehre," bk. IV, ch. 10.

or undergone the same transformations. The changes that have occurred in some have been the result of internal revolution, in others the result of conscious adoption or imitation. Woolsey justly remarks that if there were such a law of succession as described by Polybius, it would afford a most hopeless prospect to the world.[1] It would, in short, mean the reign of fatalism and of death in the domain of politics.

[1] "Political Science," vol. I, p. 469. See also Leacock, "Elements of Political Science," pp. 46–47; Rousseau, "Contrat social," bk. III, ch. 11; and Laveleye, "Le Gouvernement dans la Démocratie," bk. V, ch. 2.

CHAPTER VII

FORMS OF GOVERNMENT (*Continued*)

MERITS AND DEMERITS

I. MONARCHICAL GOVERNMENT

Antiquity and Universality of the Monarchical Form

FROM a consideration of the various forms of government, from the standpoint of their structural organization, we come next to consider, in the light of reason and experience, the elements of strength and weakness of each. Of all the types considered, the oldest and most widely distributed is the so-called monarchical form. It has existed from the earliest times and is to-day universal in Asia and nearly so in Europe. Until the latter part of the eighteenth century it was widely believed to be the nearest approach to a perfect form of political organization that could be devised by the ingenuity of man. Of its merits the English philosopher and historian David Hume wrote near the middle of the eighteenth century: "Though all kinds of government be improved on in modern times, yet monarchical government seems to have made the greatest advance to perfection. It may now be affirmed of civilized monarchies, what was formerly said of republics alone, that they are a government of laws, not of men. They are found susceptible of order, method, and constancy to a surprising degree. Property is there secure; industry is encouraged; the arts flourish; and the prince lives among his subjects like a father among his children." [1] And, he adds, there are more "sources of degeneracy" to be found in free governments like England than in France, which was then, in Hume's estimation, "the most perfect model of pure monarchy," a judgment which Sir Henry Maine pro-

[1] "Essays," no. 12, entitled "Of Civil Liberty."

nounces to be quite lacking in the essential element of truth.[1] "All the world," said Bossuet, "began with monarchy, and almost all the world has been preserved by it in the most natural state." It has its foundation, continued the same writer, in the paternal empire, that is, in nature itself.[2]

Absolute *v.* Limited Monarchy

In judging of the merits of monarchical government we must distinguish between the two forms in which it manifests itself; namely, that form in which the monarch is both sovereign and executive, and that form in which he is executive only, and usually only titular executive at that. In the former the whole power of government, the whole source of authority, is in the hands of a single person, however numerous may be his subordinates.

Merits of Absolute Monarchy

In favor of this form of government may be mentioned the elements of strength, vigor, and energy of action, unity of counsel, promptness of decision, and simplicity of organization.[3] "Where such a system prevails," said Rousseau, "the will of the people and the will of the prince, the public force of the state and the individual force of the government, all respond to the same motive power; all the springs of the machine are in the same hand, all look to the same end. There are no opposing movements which destroy each other, and no sort of constitution can be imagined in which a slight effort produces greater action." Rousseau goes on to compare a skillful monarch governing his people throughout a vast state and making everything move while seeming himself immovable, to an engineer seated tranquilly on the shore of a sea and setting in motion without difficulty a huge vessel upon the waters.[4]

[1] "Popular Government," p. 4.

[2] Quoted by De Parieu, "Principes de la Science politique," ch. 2, p. 33.

[3] "Of all systems of government," says Pradier-Fodéré, "monarchy is the most simple, its action the most prompt and most energetic, and it has been adopted by the greatest number of nations." "Principes généraux de Droit de Politique," etc., p. 243.

[4] "Contrat social," bk. III, ch. 6.

Its Place in Primitive Societies

In the early stages of civilization monarchy is undoubtedly well adapted to the needs of a people who have not yet developed a high political consciousness and who therefore lack the capacity themselves for participating actively in the management of public affairs. Perhaps no better form could be devised for disciplining uncivilized peoples, leading them out of barbarism and inculcating in them habits of obedience. John Stuart Mill has well remarked that "despotism is a legitimate mode of government for dealing with barbarians, provided the end be their improvement and the means be justified by actually effecting that end. "Liberty," he observes, "as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion. Until then there is nothing for them but implicit obedience to an Akbar or a Charlemagne, if they are so fortunate as to find one." [1] The absolute monarchies of the medieval and early modern times justified their existence through their work of consolidation and nationalization. Popular government could make no headway until provinces were consolidated into kingdoms, classes and races into nations, and conflicting jurisdictions were unified. It was the mission of absolute monarchy to establish the sovereignty of the national state in the place of the rival authorities of the church, of feudalism, of free cities, and of other obstacles which stood in the way of the development of the modern state. No other agency than absolute monarchy could have wrought out so important a result and thus paved the way for constitutional government.

Objections to Absolute Monarchy

But when all is said that can be said in favor of the pure monarchical form of government, the fact remains that it is absolute government; that is, government in which the people for whose protection and benefit governments are instituted have no share. Having exhausted its mission, its *raison d'être* no longer exists. It is government organized

[1] "On Liberty," p. 23.

and administered by a single person according to his own sense of what is best and right for those over whom he reigns, and history abundantly confirms the truth of the assertion that such governments have more often been administered in the interests of the monarch himself than in the interests of his subjects.[1] "It has long been a common form of speech," says John Stuart Mill, "that if a good despot could be insured, despotic monarchy would be the best form of government." [2] But, as he goes on to remark, it is a most "pernicious misconception of what good government is." Assuming for the sake of argument that absolute power in the hands of one individual would never be abused, but on the contrary would insure a virtuous and intelligent administration of the government; granting that good laws would be enacted and enforced, that justice would be dealt out to all, that the public revenues would be wisely and judiciously expended; in short, that the despotism were the wisest and most benevolent conceivable, there are still other considerations which render it far from being the ideal polity. Administrative efficiency is only one of the tests of a good government. No government which does not rest upon the affections of the people, which does not stimulate among them an interest in public affairs and

[1] Compare Sidgwick ("Development of European Polity," pp. 412–413), who remarks that it is not only a defect of monarchy in the sense in which we are here considering it, that the supreme lawmaking power is in the hands of a single individual, who may or may not employ it in the interests of the community, but that the execution of the laws being under the supreme control of the same person, there is no sufficient guarantee that he will observe his own laws, if passion or favor urges him to break them. See also George Cornwall Lewis, "Government of Dependencies," p. 20.

[2] "Representative Government," ch. 3. "The tendency of all monarchy," declares Lord Brougham, "is towards despotism and its evils; and a constitutional monarchy which provides no checks, that is, a pure monarchy, has enormous defects, even if it should not degenerate into an Oriental despotism. It leaves too great scope to the sovereign's interests or passions, benefits the people very little by the alliance he always forms with the nobles, gives facilities to humor his ambition by wars, allows reckless extravagance of every kind, encourages habits of costly ostentation and of pride towards inferiors, and begets a spirit of fawning and truckling towards those in authority." "The British Constitution," Works, vol. XI, p. 3.

create an active, intelligent, and alert citizenship, can be called ideal; and, certainly, no government from which the participation of the people in some form is excluded will ever be able to produce such a body of citizens.[1]

Merits of Limited Monarchy

The merits and demerits of the second type of monarchy, that is, the form of monarchy in which the reigning prince is not sovereign, but merely an organ of government, are mainly, though not wholly, those which are associated with the principle of hereditary tenure in the organization of the executive. It is this principle which mainly distinguishes the so-called constitutional monarchy to-day from the republic. About all that can be said in favor of the hereditary principle is that it tends to secure an uninterrupted and orderly succession in the executive office without the recurring dangers and inconveniences, the tumults and disorders, which are almost inseparable from the method of popular choice.[2] It also tends to promote continuity of executive polity in the conduct of the government. The

[1] Cf. Goodnow ("Comparative Administrative Law," vol. II, p. 10), who goes to the length of saying that "the prime end of all governmental systems should be the cultivation in the people of a vigorous political vitality, a patriotic loyalty, and social solidarity."

[2] For a good discussion of the advantages of the hereditary monarchy, see Sidgwick, "Elements of Politics," pp. 437–442. Compare the Marquis of Argenson, who said, "The right of succession to the crown is a method universally adopted to avoid the horrible inconveniences of election." "Considérations sur le Gouvernement," p. 108. A strong advocate of the hereditary monarchy was Dr. Paley, who declared that it was universally to be preferred to an elective government. "Nor should it be forgotten among the advantages of an hereditary monarchy," he said, "that as plans of national improvement and reform are seldom brought to maturity by the exertions of a single reign, a nation cannot attain to the degree of happiness and prosperity to which it is capable of being carried unless a uniformity of counsel, a consistency of public measure and designs be continued through a succession of ages. This benefit may be expected with greater probability where the supreme power descends in the same race, and where each prince succeeds, in some sort, to the aims, pursuits, and dispositions of his ancestors, than if the crown, at every change, developed upon a stranger whose first care would commonly be to pull down what his predecessor had built up; and to substitute systems of administration which must in their turn give way to the more favorite novelties of the next successor." "Political and Moral Philosophy," p. 215.

inherent weakness in the hereditary principle is that it affords no guarantee that a strong, vigorous, or trained person will succeed to the office, but allows the choice to be determined by the accident of birth. Thus, as a method for securing fitness and character in the executive office it has no merits. To intrust one man with the government of the people, not because he is the wisest or the best, but because he is the son or heir of another person, as a principle of politics has little to commend it. History affords numerous examples of immature, feeble-minded, and incompetent rulers succeeding to thrones under the operation of such a principle. France, for example, was governed for more than five hundred years by kings who had not reached the age of twenty-five years at the time of their accession to the throne, and for nearly one hundred years by kings who had not attained the age of twenty-one.[1]

II. ARISTOCRATIC GOVERNMENT

Forms of Aristocracy

In order to form a proper estimate of the merits and demerits of aristocratic government we must distinguish between the several forms under which it manifests itself. There are or have been, as we have seen, aristocracies of birth or family; aristocracies of wealth, and these may be of two kinds; aristocracies of culture and education; aristocracies of elder statesmen; priestly and military aristocracies;

[1] Sismondi, "Études sur les Constitutions des Peuples libres," quoted by Woolsey, "Political Science," vol. I, p. 521. "No race of kings," said Jefferson, "has ever presented above one man of common sense in twenty generations." "There is not a crowned head in Europe whose talents or merits would entitle him to be elected a vestryman by the people of any parish in America." Later in life he was inclined to concede that under certain conditions a monarchy might really be the most desirable form of government. Merriam, "American Political Theories," pp. 153–154. For further literature on the merits and demerits of monarchy as a form of government, see Treitschke, "Politik," vol. II, sec. 15; Bluntschli, "Politik," bk. VII; De Parieu, "Principes," etc., ch. 2; Paley, "Political and Moral Philosophy," bk. IV, ch. 6; Wood, "Government of the State," pp. 126–133; Pradier-Fodéré, "Principes généraux de Droit de Politique et de Législation," p. 243; Roscher, "Politik," pp. 27–32; Montesquieu, "Esprit des Lois," bk. V, ch. 11.

natural and artificial aristocracies; etc.[1] Manifestly they do not all possess the same virtues or the same vices, nor the same elements of strength or of weakness. Whatever may be the method or basis of classification or the form which aristocracy may take, the general political principle is the same, namely, that aristocratic government is government by a comparatively small portion of the population. If as a form of government it meant what the etymological derivation of the word implies, it would, as De Parieu remarks, undoubtedly be the most perfect as well as the most widely prevalent kind of government in the world.[2] Interpreted in the sense of the *best*, it is the government par excellence, the only government in fact which can be defended on sound and rational principles. It ought to be readily granted by all that only the good should govern; but, as Seeley observes, if "good" is only a euphemistic name, meaning simply a quality possessed by the wealthy or well-born, then aristocracy is only a euphemistic name for oligarchy, which is itself a perverted or "diseased" form of aristocracy.[3] The Greek notion of aristocracy was that of government by the "best," not necessarily by the wealthy or powerful. Originally it was one of the most respected, as it was one of the most widely distributed, of all forms of political organization; but in recent years the name has come to have an unsavory if not a disreputable ring about it.[4] The ancient writers like Aristotle, as has been said, carefully distinguished between aristocracy, which they defined as government by the "best," and oligarchy, which they described as government by a wealthy minority in their own interest.[5] But with modern

Should not be confused with Oligarchy

[1] Bluntschli, "Allgemeine Staatslehre," bk. VI, ch. 19; Rousseau, "Contrat social," bk. III, ch. 5; Jefferson's Works, vol. IX, p. 425.

[2] "Principes de la Science politique," p. 56.

[3] "Introduction to Political Science," pp. 323, 331. See also Lewis, "Use and Abuse of Political Terms," pp. 72–74.

[4] Compare Sidgwick, "Elements of Politics," p. 608.

[5] Aristotle, "Politics," IV, 7; IV, 14; V, 6.

notions concerning government by the few the distinction has largely disappeared, so that aristocracy has come to possess the same disagreeable meaning which the ancients associated with oligarchy. In short, the two, as forms of government, are now regarded as substantially the same.

Aristocracy emphasizes Quality; it is Conservative

One of the distinguishing characteristics of aristocracy is that it emphasizes quality rather than quantity, character rather than mere numbers.[1] It assumes that some are better fitted to govern than others, attaches great weight to experience and training as political virtues, and seeks to reward special talent and attract it into the public service. It is preëminently conservative government; it honors authority, especially when it has had the sanction of long acquiescence, and has great reverence for long-established custom and tradition. It strikes its roots deep in the past and distrusts innovation, especially when it would lay violent hands upon institutions which have become venerable with age. Where it is associated with monarchy and democracy, it acts as a tempering and restraining element. It curbs the passions of democracy and holds in check the absolute tendencies of monarchy.[2] In this sense it is, said Lord Brougham, a necessary part of a governmental system, since "nothing else can protect liberty from an arbitrary sovereign or from the more insupportable tyranny of the irresponsible multitude."[3] The very soul of it, said Montesquieu, is moderation founded on virtue. It possesses an inherent vigor, he declared, unknown to democracy.[4] Naturally jealous of its exclusive privileges and

[1] Compare Bluntschli "Politik," p. 282.

[2] Compare De Parieu, "Principes de la Science politique," pp. 59–60.

[3] "Works," vol. XI, p. 20. That aristocracy is not incompatible with liberty Milton asserted in "Paradise Lost":

> "If not equal all, yet free,
> Equally free; for orders and degrees
> Jar not with liberty, but well consist." — Bk. V, 791–793.

[4] "Esprit des Lois," bk. III, ch. 4.

fearful of its own security, it has every reason for refraining from an unwise and immoderate use of its power. Thus it avoids rash political experiments and advances only by cautious and measured step.[1] If the principle of selection were always that of genuine merit, it is difficult to see what could be said against aristocratic government *qua* government. Considered from the standpoint of the quality of the government itself, without reference to its effect upon the masses who are permanently excluded from participation in political affairs, government by the most capable few undoubtedly possesses elements of strength and efficiency which are conspicuously absent from a system in which the untrained and ignorant masses hold the reins of power. John Stuart Mill has well remarked that "the governments which have been remarkable in history for sustained mental ability and vigor in the conduct of affairs have generally been aristocracies," though, as he adds, they have been "without exception aristocracies of public functionaries — that is, of men who have made public business an active profession and the principal occupation of their lives." [2]

Weakness of Aristocratic Government

But the weakness of aristocracy as a practical system of government lies in the difficulty of finding any safe and just principle of selection by which the fittest, politically speaking, may be differentiated from the unfit and, when this is done, of providing any adequate security against

[1] The redeeming qualities of this form of government, remarks Lord Brougham, are its firmness of purpose, resistance of violent change, discontinuance of warlike policy, and encouragement of genius. Works, vol. XI, p. 3. De Tocqueville, in commenting on the merits of aristocracy, says: "It is not a question of easy solution whether the aristocracy or the democracy is most fit to govern a country. But it is certain that democracy annoys one part of the country and that aristocracy oppresses another part. When the question is reduced to the simple expression of the struggle between poverty and wealth, the tendency of each side of the dispute becomes perfectly evident without further controversy." "Democracy in America" (trans. by Reeves), vol. I, p. 203. For a further view of De Tocqueville on the merits of aristocracy, see *ibid.*, p. 258.

[2] "Representative Government," p. 107.

the temptation of the former class to exercise their powers in their own interest. It is now generally agreed that the most capable and fit of the population cannot be selected by conferring the power to govern upon certain families and their descendants, for political capacity and probity are qualities not always transmitted from father to son. There are still, however, some highly respected writers who defend under certain limitations aristocracies constituted on the hereditary principle. Sir Henry Maine, for example, has expressed the opinion that the chances of getting capable persons into the service of the state are as great under the principle of hereditary succession as under a system of popular election.[1]

Views of Seeley

"A man," said Professor Seeley, "who is the son of a statesman, who has grown up in the house of a statesman, may be presumed to have learnt something, if only some familiarity with public questions, some knowledge of forms of routine which others are likely to want; and there is a fair probability that he may have acquired more and a certain possibility that, as the younger Pitt, he may have acquired very much and also inherited very much." [2]

Lecky on Aristocratic Government

The late W. E. H. Lecky, in a defense of the English aristocracy, commenting on a saying of Benjamin Franklin that there was no more reason for hereditary legislators than for hereditary professors of mathematics, and that it was absurd to expect that the eldest son of a single family should always display exceptional or even average capacity,

[1] Thus he says ("Popular Government," p. 188): "Under all systems of government, under monarchy, aristocracy, and democracy alike, it is a mere chance whether the individual called to the direction of public affairs will be qualified for the undertaking; but the chance of his competence, so far from being less under aristocracy than under the other two systems, is distinctly greater. If the qualities proper for the conduct of government can be secured in a limited class or body of men, there is a strong probability that they will be transmitted to the corresponding class in the next generation although no assertion be possible as to individuals."

[2] "Introduction to Political Science," lect. VI.

remarked: "But it is not absurd to expect that more than five hundred families, thrown into public life for the most part at a very early age, animated by all its traditions and ambitions, and placed under circumstances exceedingly favorable to the development of political talent, should produce a large amount of governing faculty. . . . The qualities required for successful political life are, not like poetry or the higher forms of philosophy, qualities that are of a very rare and exceptional order. They are for the most part qualities of judgment, industry, tact, knowledge of men and of affairs, which can be attained to a high degree of perfection by men of no very extraordinary intellectual powers. . . . Few persons, I think, will dispute the high average capacity for government which the circumstances of the English aristocratic life tend to produce." [1] Of the value of such an aristocracy to the state Lecky goes on to say: "It is of no small importance that a nation should possess a class of men who have a large stake in the prosperity of the country, who possess a great position independent of politics, who represent very evidently the traditions and the continuity of political life, and who, whatever may be their faults, can at least be trusted to administer affairs with a complete personal integrity and honor. In the fields of diplomacy and in those great administrative posts which are so numerous in an extended empire, high rank and the manners that commonly accompany it are especially valuable, and their weight is not the least powerfully felt in dealing with democracies." [2] But when all is said that can be said in favor of birth as the principle of selection, the fact remains, as Seeley readily admits in his defense of the system, that it works for the

[1] "Democracy and Liberty," vol. I, pp. 314, 317. For De Tocqueville's view of the excellencies and faults of the English aristocracy, see his "Democracy in America," vol. I, p. 261.

[2] *Ibid.*, p. 321. Among the same line see Paley, "Political and Moral Philosophy," bk. VI, ch. 6.

false aristocracy as well as the true and that the worse traits are transmitted as well as the best.

Property not a Good Test of Fitness for Government

The possession of property, whether of land or personalty, is an equally unsatisfactory test of political capacity, especially if it be inherited wealth. If gained by honest toil, thrift, and wise management it is, however, a sign of the possession by the owner of qualities which undoubtedly fit him for some participation in public affairs, though obviously there are many men equally capable and worthy who are not property owners. In other words, property, like birth, is not the only criterion, and therefore the governing power cannot wisely be restricted to either class or to both combined. And so with all other tests which do not rest upon intrinsic merit. Yet to prove that no just or adequate tests can be found really proves nothing against aristocracy itself. The question of whether there ought to be a test by which the fitness of men to exercise a share in the government, as Seeley observes, is not answered by showing that wealth is not such a test or that birth is not such a test.[1] The trouble is not with the aristocracy, but with the test upon which it is constituted.

Artificial or "Sham" Aristocracies

Rousseau and Jefferson, both champions of democracy in their respective countries, pointed out the distinction between what they called natural aristocracies and artificial or "sham" aristocracies. Rousseau considered elective aristocracies to be the only natural ones, and these he pronounced the "best of all governments," since they insured "probity, enlightenment, experience, and all the other guarantees that the government would be wisely administered." In a word, he said, the best and most

[1] The oppression which has come from tyrannous minorities in the past has, as Seeley remarks, come not from aristocracies, but from corrupt oligarchies. Much of the objection that has been directed against aristocracy, therefore, would be more defensible if it were leveled against oligarchy. If the right test could be devised by which oligarchy could be avoided, we would have only pure and true aristocracies, and they would be hailed with delight by every one. *Op. cit.*, p. 347.

natural order is where the wisest govern the multitude, if there is any guarantee that the government will be conducted for the benefit of the people and not for themselves.[1] Jefferson agreed with Rousseau in declaring all aristocracies based on wealth or birth to be not "only useless but mischievous and dangerous" though he was a strong defender of those based on "virtue and talent."[2] Contrary to the popular belief, he was a believer in aristocratic government, when the aristocracy was of the latter kind.[3] "There is," he said, "a natural aristocracy founded on talent and virtue which seems destined to govern all societies and all political forms, and the best government is that which provides most efficiently for the purity of the choosing of these natural aristocracies and their introduction into the government." Artificial aristocracies have always been hated by the masses because they are constituted on the theory that some are born to rule and others to be their subjects. All of them, whether natural or artificial, are apt to be narrow and exclusive, and are inclined to arrogance and excessive conservatism which at times retards wholesome progress.[4]

The Passing of the Aristocratic Form

Public opinion toward aristocracies in recent times has been so unfavorable that no example of a pure aristocracy has survived the middle of the nineteenth century. The ancient aristocracy of Rome gave way to democracy. The medieval aristocracies of Germany and Italy were superseded by the growing power of the princes, and the royal

[1] "Contrat social," bk. III, ch. 5. [2] Works, vol. IX, p. 425.

[3] Compare Merriam, "American Political Theories," p. 156.

[4] Compare Bluntschli, "Allgemeine Staatslehre," bk. VI, ch. 19. See also Lord Brougham, "The British Constitution," Works, vol. XI, p. 3, for a discussion of the evils of the aristocratic form. "There never was an aristocracy," says Laveleye, "more devoted to liberty or more fitted to govern than that of England, yet it opposed every extension of the suffrage and often in legislation it sacrificed the interests of the people to its own privileges." "Le Gouvernement dans la Démocratie," vol. I, pp. 273–274. For a full discussion of aristocracy as a form of government see De Parieu, "Principes de la Science politique," ch. 3.

governments which they established were in time overwhelmed by the rise of the democracy. In modern times they survive only in part, being associated wherever they exist with democracy and monarchy. We are entitled by deductions from history, say Woolsey, to lay down the principle that aristocracy is ordinarily capable of no long continuance, when it is the sole governing or by far the strongest power in the state.[1]

Aristocracy is a very common form of government in the infancy of states, when political consciousness manifests itself only in the minds of a few. As this consciousness spreads, the state becomes democratic, and as a matter of fact most of the aristocracies of history have fallen before the advance of democracy.[2] Aristocracy proper is a principle which all states have admitted and to some extent followed in practice.[3] In all ancient states, democracies and aristocracies alike, large classes of persons were excluded from participation in public affairs. The laboring classes everywhere have been enfranchised only in comparatively recent years. In England, at the beginning of the eighteenth century one of the freest of states, all the lower classes and a large proportion of the middle classes were excluded from all share in the government of the country. And the same was true to a less degree in America for a considerable period after the colonies became independent. Modern democracies no longer exclude the laboring classes, yet practically all of them apply standards of fitness, even if they sometimes apply them indirectly and in a manner unconsciously. In this sense the governments of

[1] "Political Science," vol. II, p. 1.

[2] "Except in ancient Sparta and modern Venice," says Lord Brougham, "there is no example of an aristocracy which sooner or later was not transferred into a democracy or a monarchy." "Political Philosophy," vol. II, p. 197.

[3] "Almost all the nations," observes De Tocqueville, "which have exercised a powerful influence upon the destinies of the world by conceiving, following up, and executing vast designs — from Rome to England — have been governed by aristocratic institutions." "Democracy in America," vol. I, p. 256.

most states are aristocratic. Modern government is such a difficult art and requires so much skill and special knowledge that the whole number of persons really qualified is very small. In short, it must from the very nature of the case be largely government by specialists.

All Governments Aristocratic to some Extent

III. DEMOCRATIC OR POPULAR GOVERNMENT

The Principle of Democracy

Democratic or popular government is, as has been pointed out, that form in the constitution and administration of which the great mass of the adult population have a direct or an indirect share. The democratic governments of to-day are founded on the theory that any honest and self-supporting male citizen is, on the average, as well qualified as another for participating in the business of government.[1] They rest, said Jefferson, on confidence in the self-governing capacity of the great mass of the people, and in the ability of the average man, or of average men, to select rulers who will govern in the interest of society.[2]

But it must not be overlooked that, however democratic the basis of government may be, the actual business of governing must be restricted to a comparatively small number of persons — that is, it must be aristocratic. "The whole people cannot operate the government any more than the whole of twenty people in an omnibus can drive the horses. Some one must drive as some one must govern."

Merits of Popular Government

The chief merits of popular government consist in its beneficial effects, first, on the character of the public service

[1] Sidgwick ("Elements of Politics," p. 610) rejects the correctness of this assumption and maintains also with obvious truth that the doctrine of the consent of the governed must be taken with qualifications. See also Seeley (*op. cit.*, p. 327), who asserts that all democracies as a matter of fact apply standards of fitness and that those of a representative type are essentially aristocratic. "I do not know," he says, "in what part of history you could find a state founded on the principle that one man is as good as another."

[2] Quoted by Merriam, "American Political Theories," p. 163.

itself; and second, upon the citizens who share in its control and administration. Under the first head it is claimed for popular government that it is the only form which responds readily to the needs and desires of the people for whom it is instituted — is, in short, the only form in which responsibility to the governed can be effectively enforced. Always subject to popular control and immediately responsible to the electorate, it is largely free from the temptation to govern in its own interest or that of a class. Responsibility in any form of government is the soul of efficiency, and governments organized so as to secure in an effective manner the one are likely to possess the principal elements of the other.

Mill on Representative Democracy

By no one has the strength of democratic government in its representative form been so ably set forth as by John Stuart Mill, who defined it as that form in which "the whole people, or some numerous portion of them, exercise the governing power through deputies periodically elected by themselves." There is no difficulty in showing, he asserts, that the ideally best form of government is that in which the supreme controlling power in the last resort is vested in the entire aggregate of the community, every citizen not only having a voice in the exercise of that ultimate sovereignty, but being at least occasionally called on to take an actual part in the government, by the personal discharge of some public function, local or general.[1] The only government, he continues, which can fully satisfy the exigencies of the social state is one in which the whole people participate, and the degree of participation should everywhere be as great as the general degree of improvement of the community will allow, and ultimately *all* should be admitted to a share in the sovereign power of the state.[2] So far as the welfare of the community is concerned, the superiority of popular government, Mill goes on to say, rests upon two principles of as universal truth

[1] "Representative Government," p. 51. [2] *Ibid.*, p. 66.

and applicability as any general proposition which can be laid down respecting human affairs. The first is that the rights and interests of the individual can only be safeguarded when he is able to "stand up" for them himself; the second is that the general prosperity attains a higher degree and is more widely diffused in proportion to the amount and variety of the personal energies enlisted in promoting it.[1]

Influences of Democratic Government

But the greatest glory of democratic government in the opinion of its votaries does not flow so much from its own inherent excellence as a political contrivance, as from its influence in elevating the masses of the people, developing their faculties, stimulating interest among them in public affairs, and strengthening their patriotism by allowing them a share in its administration.[2] Democracy refuses to concede that some are born to rule and others to obey, and that some should be citizens and others subjects. It recognizes no privileged classes, but puts all on a footing of political equality. "No man is free in the political acceptation of the word," says Laveleye, "if he does not have some share in the government of his country, and he who is governed, not by functionaries whom he has helped to choose, but by authorities constituted without his consent, is a subject, not a citizen." [3] For a government in which the masses have no share they naturally show little readiness to make sacrifices. Democracy strengthens the love of country because the citizens feel that the government is their own and that magistrates are their servants rather than their masters. The French people, to quote Laveleye again, never began to love France until after the Revo-

[1] *Ibid.*, p. 52.

[2] Compare Bluntschli, "Allgemeine Staatslehre," bk. VI, ch. 21; also his "Politik," bk. VI, ch. 2; also Pradier-Fodéré, "Principes généraux de Droit de Politique," etc., p. 240.

[3] "Le Gouvernement dans la Démocratie," vol. I, p. 273. See also Vacherot, "La Démocratie," ch. 1, for an argument that liberty can exist only under the democratic form; also Prius, "Esprit du Gouvernement démocratique," ch. 1.

lution, when they were admitted to a share in its government, since which time they have adored it.[1] Popular governments, resting as they do on the consent of the governed and upon the principle of equality, are more immune from revolutionary disturbances than those in which the people have no right of participation. De Tocqueville has justly remarked that almost all revolutions which have changed the face of the world have had for their purpose the destruction of inequality.

Reaction upon the Quality of the Government

The same author, in his study of democracy in America, dwelt repeatedly upon the interest which the American people take in public affairs, their high state of intelligence in regard to political matters, and their natural patriotism.[2] He pointed out that one of the great advantages of a democracy is that it serves as a sort of training school for citizenship. Mill likewise laid great stress upon the influence of democracy in elevating the character and intelligence of the masses. The "most important point of excellence," he said, "which any form of government can possess is to promote the virtue and intelligence of the people themselves, and the first consideration in judging of the merits of a particular form of government is how far they tend to foster intellectual and moral qualities in the citizens." [3] The government which does this best, he continues, is likely to be the best in all other respects. Government is thus an agency of education as well as an organization for managing the collective affairs of the community.

Elements of Weakness

The faults and weaknesses of democracy as a form of government have been emphasized by many writers in the past, and have more often been exaggerated than impartially stated. First of all, it is said that democracy

[1] "Le Gouvernement dans la Démocratie," vol. I, p. 274.

[2] See especially, vol. I, pp. 94, 97, 259, 263.

[3] "Representative Government," p. 29. For further discussion of the virtues of democratic government, see Benoist, "Sophismes politiques de ce Temps," ch. 3.

emphasizes quantity rather than quality, in that it does not give proper consideration to worth and special fitness, qualities that count for so much in other fields of human activity. It rests on the false principle that one man is as capable of governing as another, in short, that all men are specialists when it comes to the business of government. Yet government really done well, as the late Mr. Justice James Fitzjames Stephen aptly remarked, requires an immense amount of special knowledge and the steady, restrained, and calm exertion of a great variety of the highest talents which are to be found.[1] The results of ignorance and incapacity can no more be avoided in the difficult art of government than in private business; they are as disastrous in the one as in the other. Both Montesquieu and Mill admitted that democratic government was practicable only where the citizens possessed a high amount of virtue and intelligence. Democracy stands for short tenures, rotation in office, honorary as contradistinguished from professional service, and the extension of the privilege of officeholding to all without qualification — principles certainly not conducive to strength and efficiency in government.[2] Burke once criticised democracy for the overconfidence of those who participate in the government and for their sense of irresponsibility. If a blunder or a wrong be committed, he said, the share of each individual in the responsibility or infamy is infinitesimal. Each man's approbation of his own acts has to him the appearance of a public judgment in his favor. "A perfect democracy," he affirmed, "is the most shameless thing in the world, and as it is the most shameless it is also the most fearless."[3] Some writers have attempted

[1] "Liberty, Fraternity, and Equality," p. 245.

[2] Cf. Pradier-Fodéré, "Principes généraux de Droit de Politique," etc., pp. 240–241.

[3] "Reflections on the French Revolution" (Clarendon ed., p. 110). See also his Collected Works, vol. IV, p. 227. But he obviously meant a pure, not a representative democracy.

to show that democratic societies are not favorable to art, science, and culture because their governments do not encourage such things either by direct aid or through the maintenance of conditions under which they naturally flourish.[1]

Maine's Criticism of Democracy

Two of the most vigorous criticisms of democracy to be found in English literature are those of Sir Henry Maine, in his work on "Popular Government," and Professor W. E. H. Lecky, in his "Democracy and Liberty." Maine, after a review of the history of popular government, concluded that "it affords little support for the assumption that it has an indefinitely long future before it." Experience, he asserted, rather tends to show that it is a form of government characterized by "great fragility," and that since its appearance in the world "all forms of government have become more insecure than they were before." [2] "Popular governments," he declared, "have been repeatedly overturned by mobs and armies in combination; of all governments they seem least likely to cope successfully with the greatest of all irreconcilables, the nationalists; they imply a breaking up of political power into morsels and the giving to each person an infinitesimally small portion; they rest upon universal suffrage, which is the natural basis of tyranny; they are unfavorable to intellectual progress and the advance of scientific truth; they lack stability; and they are governments by the ignorant and unintelligent." [3] "Of all the forms of gov-

[1] See, for example, Bluntschli, "Allgemeine Staatslehre," bk. VI, ch. 23; also his "Politik," bk. VI, ch. 2. Bluntschli, however, thinks that democracies are more favorable than other forms of government to public education, charity, etc. The subject is discussed by De Tocqueville in his "Democracy in America," vol. II, bk. I, chs. 9–12. See especially pp. 32, 35, 40, 42, 51, 52, 80, of the English translation by Reeves. See also Maine, "Popular Government," ch. 1; and Laveleye, "Le Gouvernement dans la Démocratie," bk. VI, ch. 7.

[3] "Popular Government," p. 20.

[2] The signs of the times, says Maine, are not at all of favorable augury for the future direction of great multitudes by statesmen wiser than themselves. The leaders may be as wise and able as ever, but they are manifestly listening nervously

ernment, democracy," he declared, "is by far the most difficult. Little as the governing multitude is conscious of this difficulty, prone as the masses are to aggravate it by their avidity for taking more and more powers into their direct management, it is a fact which experience has placed beyond all dispute. It is the difficulty of democratic government that mainly accounts for its ephemeral duration." [1]

No Connection between Democracy and Liberty

The inherent difficulties of democratic government, he goes on to say, are so great and manifold that in large complex modern societies it could neither last nor work if it were not aided by certain forces which are not exclusively associated with it, but of which it greatly stimulates the energy. The prejudices of the people are far stronger than those of the privileged classes; they are far more vulgar and they are far more dangerous because their opinions are apt to run counter to scientific conclusions.[2] Maine denies that there is any real connection between democracy and liberty, and asserts that in case there is and the choice has to be made between them, it is better to remain a nation capable of displaying the virtues of a nation than even to be free.[3] "By a wise con-

at one end of a speaking tube which receives at the other end the suggestions of a lower intelligence. *Ibid.*, p. 38.

[1] Cf. Pradier-Fodéré ("Principes généraux de Droit de Politique," etc., p. 240), who, while pronouncing democratic government to be the "most rational in principle," declares that it is the "most difficult to apply." Cf. also Duguit, "Droit constitutionnel," p. 386.

[2] *Ibid.*, p. 67. Compare also Hyslop in his "Democracy" (p. 35), who maintains that "a small country, with a scanty population, few resources and industries, and similar social sentiments, may go on without much difficulty under democratic institutions. But a vast territory with untold material wealth waiting for labor, a growing population and with it an increase in the severity of the struggle for existence, and the great diversity of moral, economic, political, and social sentiments, must call for government that corresponds to this complexity."

[3] *Ibid.*, p. 63. Maine expresses the opinion that the government of a benevolent despot is preferable to that of a democracy. "There is no doubt," he says, "that the Roman emperor cared more for the general good of the vast groups of societies subject to him than the Roman republic had done." "Popular Government," p. 83. Cf. also Laveleye on "The Good Despot," *op. cit.*, bk. V, ch. 7.

stitution," says Maine, "democracy may be made as calm as the water in a great artificial reservoir; but if there is a weak point anywhere in its structure, the mighty force which it controls will burst through it and spread destruction far and near."[1]

Lecky on the Evils of Democracy

Lecky likewise dwells upon the dangers of government by the "poorest, the most ignorant, the most incapable, who are necessarily the most numerous."[2] The idea of government by such a class reverses, he declares, all the past experience of mankind. "In every field of human enterprise, in all the computations of life, by the inexorable law of nature, superiority lies with the few and not with the many, and success can be obtained by placing the guiding and controlling power mainly in their hands." "Democracy insures neither better government nor greater liberty; indeed, some of the strongest democratic tendencies are adverse to liberty. On the contrary, strong arguments may be adduced both from history and from the nature of things to show that democracy may often prove the direct opposite of liberty." Ancient Rome and modern France, for example, seem to furnish evidence of the truth of Lecky's assertion. The French despotisms, which had their foundations on plebiscites, were quite as natural forms of democracy as republics, yet liberty can hardly be said to have been one of their virtues. To place the chief power in the most ignorant classes is to place it in the hands of those who naturally care least for political liberty and who are most likely to follow with an absolute devotion some strong leader. The upper and middle classes have shown the greatest devotion to liberty and have been its most ardent defenders, while democracy has often enough sought to dethrone

[1] "Popular Government," p. 111.

[2] For his views on government by the "unthinking and irresponsible multitude," see his "Democracy and Liberty," vol. I, pp. 18–21, where the evils of universal suffrage were dwelt upon.

it.[1] Speaking of the United States, he declares, as De Tocqueville did before him, that in hardly any other country does the best life and energy of the nation flow so habitually apart from politics, and is the best talent so rarely chosen to the public service.[2] Likewise he adopts the view of De Tocqueville, Laveleye, Bluntschli, and Maine that democracy is unfavorable to the development of the higher forms of intellectual life, such as literature, art, and science, in short, that democracy levels down quite as much as up.[3] Speaking of the alleged equality upon which the American democracy rests, Maine declares that "there has hardly ever been a community in which the weak have been pushed so piteously to the wall; in which those who have succeeded have so uniformly been the strong, and in which, in so short a time, there has arisen so great an inequality of private fortune and domestic luxury."[4] Laveleye, in his work entitled "Le Gouvernement dans la Démocratie," argues similarly to show that democracy does not necessarily produce equality any more than it produces liberty, and that it is, besides, the enemy of both wealth and culture. Inequality of conditions and the struggle of classes, he declares, were responsible for the fall of the ancient democracies. If the people are ignorant and incapable, democracy must inevitably degenerate into anarchy and despotism, and both equality and liberty will be lost.[5]

Democracy is Unfavorable to Literature, Science, and Art

Democracy produces Inequality as well as Equality

[1] "Democracy and Liberty," vol. I, pp. 212–215. On the subject of democracy and universal suffrage, see Prins, "Esprit du Gouvernement démocratique," ch. 3.

[2] *Ibid.*, p. 94; De Tocqueville, *op. cit.*, vol. I, ch. 13. [3] *Ibid.*, pp. 105, 108.

[4] "Popular Government," p. 51. Compare also Stephen ("Liberty, Fraternity and Equality," p. 239), who remarks that "in a pure democracy the ruling men will be the wire-pullers and their friends; but they will be no more on an equality with the people than soldiers or ministers of state are on an equality with the subjects of a monarchy. Under all circumstances the rank and file are directed by leaders of one kind or another, who get the command of their collective force." For further discussion of the defects of democracy see Jethro Brown, "The New Democracy," ch. 2.

[5] See especially bk. VI, chs. 5, 6, and 7. Laveleye argues, very properly, it would

The Future of Democracy

Concerning the future of democratic government there is no longer any considerable difference of opinion. The adverse opinions that used to be so commonly expressed have slowly dwindled in number and respectability until only here and there are serious doubts raised, though warnings are still frequently heard. Sir Henry Maine, who ventured the opinion twenty-five years ago that the history of popular government did not warrant the assumption that it had an indefinite future, admitted that the example of the United States had done much to raise the credit of democratic republics and to reveal their possibilities. Lecky, who, like Maine, feared and distrusted democracy, also admitted that it was "likely to dominate, at least for a considerable time, in all civilized countries," and that the only questions to be met were those relating to the form which it should take and the means by which its characteristic evils could be best avoided. The most remarkable political phenomenon of the latter part of the nineteenth century, as Lecky observes, has been the "complete displacement of the center of power in free governments." Democracy has advanced until it has spread over the greater part of the civilized world. It has in effect wrought a profound and far-reaching revolution throughout Europe and America, though in

seem, that education ought to be obligatory, and also free and non-sectarian, in a democracy, as a means of preserving it from the calamities of which he speaks above, p. 328. Lord Brougham (Works, vol. XI, p. 4) offers the following estimate of democratic government: "The democratic form has some virtues of a high order. The rulers have no sinister interests; personal ambition has no scope; purity is promoted, not merely in the conduct of public men, but in the manners of the people; and the resources of the state are husbanded at all times; while in war they are fully called forth. The defects, however, are equal to the excellencies. The supreme power is placed wholly in irresponsible hands, because the holders of it are secure from all personal risk, and beyond the reach of censure; and those whom they choose to exercise it share in their irresponsibility. There is no security for steady and consistent policy, either in foreign or domestic affairs; a risk of entire and violent change attends the administration, and even the constitution; and the peace of the country, as well abroad as at home, is in perpetual and imminent danger."

most instances it has been effected without acts of violence or change in the external framework of the government. Its continued spread is inevitable and irresistible, and no hand can stay its advance. For more than half a century the opinion has been steadily gaining ground that the masses are as well qualified for governing and more worthy to be trusted than any small minority, however respected or highly trained. Democracy represents for us, as Sidgwick aptly remarks, not merely a depressingly prevalent political fact, but a widely and enthusiastically accepted political ideal.[1] Lecky is charitable enough to say that the American democracy is not a failure, but he asserts that it carries with it at least as much of warning as of encouragement. One thing is absolutely essential to its safe working, he concludes, namely, a "written constitution, securing property and contract, placing difficulties in the way of organic changes, restricting the power of majorities, and preventing outbursts of mere temporary discontent and mere casual coalitions from overthrowing the main pillars of state."[2] He might also have added to his list of essentials an intelligent and virtuous citizenship, for upon this strong foundation, more than upon anything else, the future of democracy throughout the world depends. Happily the widespread interest in public education and civic honesty offers an encouraging prospect for its future.

Conditions essential to its Success

What has been said above concerning the strength and weakness of democracy has reference mainly to representative democracy. The pure or direct type exists in too rare and restricted a form in the modern world and is too impracticable to merit extended consideration. Sufficing for the simple needs of the few communities where it still survives, it is wholly unsuited to the conditions of the

Pure or Direct Democracy

[1] "Elements of Politics," p. 608. On "the present theory of democracy," see Jethro Brown, "The New Democracy," ch. I.

[2] "Democracy and Liberty," vol. I, p. 112.

complex states of to-day. Nevertheless recent years have seen the growth of popular dissatisfaction with the representative system, and a demand for more direct participation of the masses in the government, particularly in the legislative function.[1] This growing self-consciousness of the masses has found expression in a variety of new institutional forms of democracy, such as the referendum, the initiative, proportional representation, the recall, etc.

New Forms of Democracy

The introduction of these new forms of direct democracy into the constitution of many states bids fair to work important changes in the character of the representative system.

IV. FEDERAL GOVERNMENT

Advantages of Federal Government

Federal government, like all other forms, has its elements of strength and of weakness, its advantages and its disadvantages. Among the more conspicuous merits of the federal system may be noted, first of all, that it affords a means of uniting into a powerful state commonwealths more or less diverse in character and having dissimilar institutions, without extinguishing wholly their separate existences. It furnishes the means of maintaining an equilibrium of centrifugal and centripetal forces in a state of widely different tendencies. Federalism has been the means of bringing together many petty states in the past which, but for this, would have remained forever apart. It has thus proved a powerful unifying force where other forms of government have repelled. Again, it excels all other forms of government in the effectiveness with which it combines the advantages of national unity and power with those of local autonomy.[2] It secures at the same

[1] Cf. Godkin ("Unforseseen Tendencies of Democracy," p. 144), who declares that the representative system, after a century of existence under a very extended suffrage, has failed to satisfy the expectations of its early promoters and is likely to make way in turn for the more direct action of the people on the most important questions of government.

[2] The federal system, says De Tocqueville, was created with the intention of com-

time all the advantages of uniformity in the regulation of affairs of general concern with those of diversity in the regulation of local affairs. Instead of concentrating the power of the state in a single organ or set of organs, as is the case in the unitary state, federalism distributes it between a common central government and a number of local governments, and thus prevents the rise of a single despotism absorbing all political power and menacing the liberties of the people.[1] By securing the advantages of self-government for the people in those affairs which are peculiarly local to them, it reconciles them to the loss of power which they have sustained through the surrender of their control over other affairs to the general government. Furthermore, through the right of local self-government, the interest of the people in local affairs is stimulated and preserved, they are educated in their civic duties, and this in turn reacts upon the character of the local administration. Federalism, observes Bryce, allows experiments in local legislation and administration which could not safely be tried in a large country having a unitary system of government. At the same time it supplies the best means of developing a new and vast country by allowing the particular localities to develop their special needs in the way they think best.[2]

Views of Political Writers

The excellencies of federal government have been widely and frequently dwelt upon by political writers during the last half century. John Fiske declared it to be the only kind of government which, according to modern ideas, is permanently applicable to a whole continent.[3] Sidg-

bining the different advantages which result from the greater and the lesser extent of nations. "Democracy in America," vol. I, p. 176.

[1] "It is very probable," says Montesquieu, "that mankind would have been at length obliged to live continuously under the government of a single person had they not contrived a kind of constitution that has all the advantages of a republican together with the external forces of a monarchical government; I mean a confederate republic." "Esprit des Lois," bk. IX, ch. 1.

[2] "The American Commonwealth," ch. 28. [3] "American Political Ideas," p. 92.

wick, an English writer, predicts that we shall see an extension of it even in western Europe, where the example of America will be followed.[1] The German writer Brie, who has made an elaborate study of federal government, declares that it represents the highest realization of the state idea;[2] while Westerkamp, whose researches have been along the same line, dwells upon its excellencies and points out that it has spread until it embraces a portion of the globe equal to three times the territorial area of Europe.[3]

Weaknesses of Federal Government

In recent years, however, owing to changed conditions under which its success has been less marked, there has been an increasing disposition to dwell upon the weaknesses as well as the virtues of federal government. These weaknesses are coming to be more apparent as economic and industrial conditions of society become more complex and require uniformity of regulation. As one writer has recently said: "Federal government has very decided limitations, serious faults of structure, unheeded perhaps at the time of its inception, but likely to break down under the altering strain of a new environment. Politically and on its external side it has proved itself strong, but economically and in its internal aspect it is proving itself weak." [4]

First of all, in the conduct of foreign affairs federal government possesses an inherent weakness not found in unitary government. The experience of the United States in particular has shown that the individual members of the federal union, by virtue of their reserved powers over the rights of person and property, may embarrass the national government in enforcing its treaty obligations in respect to aliens residing in the United States. Likewise in the do-

[1] "Development of European Polity," p. 439.

[2] "Theorie der Staatenverbindungen," p. 135.

[3] "Staatenbund und Bundesstaat," p. vi.

[4] Leacock, "Limitations of Federal Government," "Proceedings of the American Political Science Association," vol. V, p. 39.

main of internal affairs federal government has given evidence of weaknesses which have grown enormously in recent years. It means division of power between coördinate authorities in many fields of legislation and administration, and division of power always produces weakness, whatever other advantages it may secure. Particularly as respects such matters as commerce and transportation, marriage and divorce, labor, and industries which are national in their scope of operation, federalism usually means variety of regulation where there ought to be uniformity. It is here that some of the most serious faults of the United States federal system have shown themselves.[1] In the domain of military affairs federalism is of course entirely out of place, and usually where the federal system of government exists the unitary principle prevails in military administration.[2]

[1] Of course it does not necessarily follow that there must be variety of legislation under the federal system in any particular domain. That depends upon the methods of distribution. The regulation of marriage and divorce, for example, may be conferred upon the central government, as is the rule in Germany, instead of being left to the separate states, in which case there will be uniformity. It is not necessary, therefore, to abolish the federal system in order to remove such evils as those connected with want of uniformity of legislation. That may be done by a redistribution of powers by which the central government is given exclusive jurisdiction over those subjects which require uniformity of legislation.

[2] Commenting on the federal system, De Tocqueville says, "It is one of the combinations most favorable to the prosperity and freedom of man. I envy the lot of those nations which have been enabled to adopt it." However, he expresses doubt whether such a government could maintain a long or unequal contest with a nation of similar strength in which the government is centralized. "Democracy in America," vol. I, p. 183. For further discussion of the weakness of federal government, see De Tocqueville, ch. 8, especially pp. 141, 156, 173, 176, 181, 183; also Dicey, "Law of the Constitution" (second ed.), p. 158; Boutmy, "Études de Droit constitutionnel," pp. 156–158; Le Fur und Posener, "Bundesstaat und Staatenbund," sec. 78. Bryce sums up the "faults" of federal government as follows:

1. Weakness in the conduct of foreign affairs.
2. Weakness in home government, that is to say, deficient authority over the component states and the individual citizens.
3. Liability to dissolution by the secession or rebellion of states.
4. Liability to division into groups and factions by the formation of separate combinations of the component states.

Future of Federal Government

Concerning the future of federal government there is, of course, a difference of opinion. Some writers maintain that it is only a transitory form and will ultimately give way to the unitary form, just as confederate government has nearly everywhere been superseded by the federal system. It was established, its critics assert, out of sheer pressure of external necessity rather than from its own inherent excellence; and it marks merely a transition stage through which many states have been obliged to pass in order to attain a more perfect organization.[1] But this pressure having been removed, and the preliminary stage having been passed through, the principal purposes of federal government will have been accomplished, and it will give way to a more efficient system — one better adapted to the conditions and needs of the present civilization.

5. Want of uniformity among the states in legislation and administration.
6. Trouble, expense, and delay due to the complexity of a double system of legislation and administration. "The American Commonwealth," ch. 28.

[1] This is the opinion of Held, Rivier, Freeman, Dicey, Leacock, and others. Leacock asserts that "in proportion as economic progress results in industrial integration federal government is bound to give way. It is destined finally to be superseded by some form of really national and centralized government, occupying at its own discretion whatever part of the total economic and industrial field it may see fit to occupy, untrammeled by the network of a written constitution and the jugglery of judicial interpretation." "Limitations of Federal Government," Proceedings of the American Political Science Association, 1908, p. 52. The weakness of federal government, observes Dicey, springs from two different causes: first, the division of powers between the central government and the states; second, the distribution of powers among the different branches of the national government. The first is inherent in the federal system, the second is not. Moreover, a federal system can flourish only among communities imbued with a legal spirit and trained to reverence the law. Federalism substitutes litigation for legislation, and no nation which cannot acquiesce in the finality of possibly mistaken judgments is fit to form part of a federal state. "Law of the Constitution," pp. 158, 166, 167. For a contrary view, see Le Fur and Posener, *op. cit.*, p. 332, who assert that the facts of history contradict the statement that the federal system marks a mere transitory stage from the confederate to the unitary state; on the contrary, in several instances, notably in the cases of Germany, Mexico, and Brazil, unitary states have adopted the federal system because of its manifest advantages over unitary government.

V. THE TEST OF A GOOD GOVERNMENT

Some writers have endeavored to lay down certain general principles concerning the best form of government for all societies and all conditions of men. Others have adopted the view of the poet:

> "For forms of government let fools contest,
> That which is best administered, is best."[1]

Adaptation of Government to Circumstances

We are safe in saying that no single form of government is adapted to all conditions and stages of society. In determining what are the characteristics of the best government for any particular society we must take into consideration the stage of development which the society has attained, the intelligence and political capacity of the people, their history and traditions, their race characteristics, and a variety of other elements. "To attempt," says John Stuart Mill, "to say what kind of government is suited for every known state of society would be to compose a treatise on political science at large."[2] Monarchy is undoubtedly a desirable system for certain purposes; aristocracy is better adapted to certain others; while democracy is still better suited to other societies. Universal suffrage may be well suited to certain stages of society, while in others it would lead to a breakdown of government. Federal government is excellently adapted to certain stages of political development, while unitary government is better suited to others. Confederate government and even theocracies, as we have tried to show, have their places in the development of the state. No single form of government is adapted to all societies any more than a suit of clothes can be made to fit all men. The system best suited to Sparta was not the best for Athens; what is best for a large empire is not necessarily the best for a state of small area. What was the best

[1] Pope's philosophy was, as Hamilton said, a "political heresy," since a bad government can hardly be well administered, while a good one may be badly adminstered.

[2] "Representative Government," p. 42.

for England in the time of the Tudors is not the best for England to-day. If mere security of life and property are the main objects to be attained, then a very different kind of government will suffice from that which is necessary when the promotion of the social well-being of the people is considered a necessary object. "If," says Lieber, "the object is to reform and reorganize the debased and nerveless population of a large country in a tropical climate as that of Egypt, the government must essentially differ from that of an industrial people who, like the Dutch, must battle with the sea." [1] Government is like a house which must be adapted in construction to its peculiar purposes and needs. The most that can be done is to lay down a few general principles, and these will be determined by the point of view or prejudices of the writer. Alexander Hamilton declared that the "true test of a good government" was its "aptitude and tendency to produce a good administration." [2] John Stuart Mill said "the first element of a good government" was the "promotion of the virtue and intelligence of the people." The first question to be considered, he said, was "how far does the government tend to foster the moral and intellectual qualities of the citizens?" The government which does this best, he maintains, is likely to be the best in other respects.[3] The main criterion of a good government, in other words, is the degree to which it tends to increase "the sum of good qualities" in the governed, collectively and individually, rather than the efficiency of the government itself as an administrative body.

Mill's Test

[1] "Political Ethics," vol. I, p. 313. [2] "The Federalist," No. 66.
[3] See his "Representative Government," ch. 2.

CHAPTER VIII

SOVEREIGNTY

Suggested Readings: AUSTIN, "Jurisprudence," Lect. VI; BLISS, "On Sovereignty," chs.6–8; BLUNTSCHLI, "Allgemeine Staatslehre," bk. VII, chs. 1–3; BOREL, "Étude sur le Souveraineté de l'État federatif"; BRIE, "Theorie der Staatenverbindungen," sec. 28 ff.; BROWN, "The Austinian Theory of Law," chs. 3, 5; BRYCE, "The Nature of Sovereignty," in his "Studies in Jurisprudence and History," vol. II; BURGESS, "Political Science and Constitutional Law," vol. I, bk. II, ch. 1; CONSTANT, "Politique constitutionnelle," vol. I, ch. 1; DEWEY, "Austin's Theory of Sovereignty," "Political Science Quarterly," vol. IX; DICEY, "Law of the Constitution," Lect. II, also his "Law and Public Opinion," Lect. I; DOCK, "Der Souveränitäts-begriff"; ESMEIN, "Droit constitutionnel," tit. II, ch. 2; FROEBEL, "Theorie der Politik," chs. 5 and 6; GAREIS, "Allgemeine Staatslehre," in MARQUARDSEN'S "Handbuch," vol. I, sec. 10; GERBER, "Grundzüge eines Systems des deutschen Staatsrechts," secs. 7–13; GREEN, "Political Obligations," pp. 80–136; HAUCKE, "Bodin, eine Studie über den Begriff der Souveränität"; HOLLAND, "Elements of Jurisprudence," pp. 43–48, 321–323; JELLINEK, "Recht des modernen Staates," bk. V, ch. 14; also his "Lehre von den Staatenverbindungen," pp. 21–58; LEWIS, "Use and Abuse of Political Terms," pp. 41–57; LOWELL, "Essays on Government," No. 5; MAINE, "Early History of Institutions," Lects. XII, XIII; MCKECHNIE, "The State and the Individual," chs. 4, 10; MERRIAM, "History of Sovereignty since Rousseau," ch. 1; MEYER, "Deutsches Staatsrecht," sec. 6; MULFORD, "The Nation," ch. 8; OPPENHEIM, "International Law," vol. I, pt. I, ch. 1; POLLOCK, "History of the Science of Politics," ch. 4; PRADIER-FODÉRÉ, "Principes généraux de Droit de Politique," etc., ch. 8; REHM, "Allgemeine Staatslehre," in MARQUARDSEN'S "Handbuch," Einleitungsband, secs. 10–16; RITCHIE, "The Conception of Sovereignty," "Annals American Academy of Political and Social Science," vol. I; also his "Darwin and Hegel," ch. 8; SIDGWICK, "Elements of Politics," ch. 21; WAITZ, "Grundzüge der Politik," pp. 153–219; WILLOUGHBY, "Nature of the State," chs. 9, 11; WILSON, "An Old Master and Other Essays," ch. 3.

I. DEFINITIONS AND DISTINCTIONS; LEGAL VERSUS POLITICAL SOVEREIGNTY; DE FACTO VERSUS DE JURE SOVEREIGNTY

Sovereignty the most Distinctive Mark of the State

THE one mark which fundamentally distinguishes the state from all other human associations is supremacy of will and action — the supreme power to command and enforce obedience. It is not enough that the state should have a single collective will — other associations have that — but its will must dominate all other wills and override them in case of conflict. There is in every independent political community not in the habit of obedience to a superior, as Sir Henry Maine has observed, some single person or some combination of persons which has the power of compelling other minds to do exactly as it pleases, and, he adds, this person or agency may be found as certainly as the center of gravity in a mass of matter.[1] To this power, legally speaking, all interests are potentially subject, and all wills subordinate. We call this attribute or power sovereignty. The study of its nature and characteristics constitutes one of the most important, if not the most important, topic in political science.[2]

The Term

The term "sovereignty" (*souveraineté*) is derived from the Latin *superanus* (supreme, sovereign), and was first employed by Bodin in his celebrated work "De la République," published in 1576.[3] The idea, however, is as old as Aristotle.[4] Since Bodin first intro-

[1] "Early History of Institutions," p. 349.

[2] Cf. Willoughby, "Nature of the State," p. 185.

[3] See Schulze, "Deutsches Staatsrecht," vol. I, sec. 16; Bluntschli, "Allgemeine Staatslehre," bk. VII, ch. 1; also his "Geschichte der neueren Staatswissenschaften," p. 32.

[4] See his "Politics," III, ch. 7. There is no exact equivalent in the German language for the term sovereignty, the terms "*Herrschaft*," "*Obergewalt*," "*Staatsgewalt*," and "*Staatshoheit*" being variously used, though there is a shade of difference between them. Thus "*Obergewalt*" rather signifies internal sovereignty; "*Staatshoheit*" denotes dignity and majesty; "*Staatsgewalt*," power without reference to dignity, etc.

duced the term into the literature of political science, the word and the idea, observes Bluntschli, have exercised a vast influence on the development of constitutions and on the whole politics of modern times.[1]

Definitions of sovereignty, like definitions of the state, are almost infinite in number. Bodin, the first writer to employ the term, defined it as "the *summa in cives ac subditas legibusque soluta potestas*" — the supreme power of the state over citizens and subjects, unrestrained by law. Grotius, who wrote half a century later, defined it as "the supreme political power vested in him whose acts are not subject to any other and whose will cannot be overridden."[2] Blackstone conceived it to be "the supreme, irresistible, absolute, uncontrolled authority in which the *jura summi imperii* reside."[3] Jellinek has defined it as "that characteristic of the state in virtue of which it cannot be legally bound except by its own will or limited by any other power than itself."[4] The French publicist Duguit defines it simply as the power of willing and commanding.[5] Burgess characterizes it as "original, absolute, unlimited power over the individual subject and over all associations of subjects."[6] Again he calls it "the underived and independent power to command and compel obedience."[7] Definitions

[1] *Op. cit.*, bk. VII, ch. 1.

[2] "De Jure Belli et Pacis," bk. I, ch. 3, Whewell's ed., p. 112.

[3] "Commentaries on the Laws of England," Chase's ed., p. 14. Justice Story of the United States defined it in almost the same language — see his "Commentaries on the Constitution of the United States," vol. I, sec. 207.

[4] "Lehre von den Staatenverbindungen," p. 34; also his "Recht des mod. Staates," pp. 421 ff.

[5] "Droit constitutionnel," p. 117.

[6] "Political Science and Constitutional Law," vol. I, p. 52.

[7] "Political Science Quarterly," vol. III, p. 128. Other definitions are the following: "Sovereignty is that power which is neither temporary nor delegated, nor subject to particular rules which it cannot alter, nor answerable to any other power on earth," Pollock, "Science of Politics," p. 49; "Sovereignty is the daily operative power of framing and giving efficacy to the laws," Wilson, "Old Master and Other Essays," p. 81; "Sovereignty is the supreme will of the state," Willoughby, "Nature of the State," p. 280, see also his "American Constitutional System," p. 4. For other

Titular *v.* Actual Sovereignty.

Before proceeding with a discussion of the attributes of sovereignty it will be well for us to differentiate between the several meanings which the term has come to possess. In the first place, we may note the distinction between titular and actual sovereignty. Titular sovereignty is the supremacy fictitiously attributed to a ruling prince, who personifies the power and majesty of the state and in whose name the government is conducted, the real sovereignty being in other hands. Thus the crowned heads of Europe are officially designated as "sovereigns," though of course they are only such in a nominal or titular sense.

Legal *v.* Political Sovereignty.

Again, we must distinguish between legal and political sovereignty. The former represents the lawyer's conception of sovereignty, that is, sovereignty as the supreme law-making power. The legal sovereign, therefore, is that determinate authority which is able to express in a legal formula the highest commands of the state; that power which can override the prescriptions of the divine law, the principles of morality, the mandates of public opinion, etc. This is the only sovereignty recognized by the courts. Behind the legal sovereign, however, is another power, legally unknown, and incapable of expressing the will of the state in the form of legal command, yet, withal, a power to whose mandates the legal sovereign must in practice bow and whose will must ultimately prevail in the state. This is the political sovereign. In a narrower sense the electorate constitutes the political sovereign, yet in a wider sense it may be said to be the whole mass of the population, including every person who contributes to the molding of public opinion.[1] Powerful as it is, however, it cannot itself express its

definitions see Gareis, "Allgemeine Staatslehre," sec. 10; Austin, "Jurisprudence," Lect. 6; Bornhak, "Allgemeine Staatslehre," p. 9; Bluntschli, "Allgemeine Staatslehre, bk. VII, ch. 1.

[1] "Thus," says Herbert Spencer, "that which from hour to hour in every country governs despotically or otherwise produces the obedience, making political action possible, is the accumulated and organized sentiment felt towards inherited institutions, made sacred by traditions; . . . hence it is undeniable that, taken in its widest

will in the form of a legal rule, except where the principle of the pure democracy prevails, though it may command the legislature to do its bidding, and if the command is clearly pronounced and fully understood, it will not be lightly disregarded.

The Legal Sovereign

Where the will of the legal sovereign and the political sovereign conflict, the former must, however, take precedence, since only that which has been embodied in legal form will be enforced by the courts, however much more in accordance with the principles of expediency or abstract justice the mandate of the political sovereign may seem to be. The legal sovereign, observes a well-known writer, is the lawyer's sovereign *qua* lawyer, the sovereign beyond which lawyers and courts refuse to look. For the lawyer a law may be good law, legally, though passed by a parliament which has been condemned by the political sovereign, the electorate. With the wishes or feelings of the electors the lawyer as lawyer has nothing to do.[1] He may take into consideration their opinions and wishes, but until the latter have been embodied in a written legal command they are for him mere *brutum fulmen*. James Bryce has remarked that the distinction between legal and political sovereignty is largely the result of the difference between the juristic and the popular conception of sovereignty. "To an ordinary layman," he says, "the sovereign is that person or body of persons which can make his or their will prevail in the state, who is acknowledged to stand at the top, who can get his own way and make others go his. For the lawyer, however, a more definite conception is required. To him the sovereign is no other person or body than him to whose directions the law attributes legal force, the person or body in whom resides as of right the ultimate power of laying

acceptation, the feeling of the community is the sole source of political power." (Quoted by Woodrow Wilson in "Old Master and Other Essays," p. 72.)

[1] Ritchie, "Annals of the American Academy of Political and Social Science," vol. I, p. 401.

down general rules. This person or body is the legal sovereign and represents the juristic conception."[1]

Criticism of the Distinction

Some writers reject the distinction between legal and political sovereignty on the ground that it seems to involve the recognition of a dual sovereignty in the state.[2] A little reflection, however, will show that the distinction between legal and political sovereignty does not rest upon the principle of a divided sovereignty, but rather upon the distinction between two different manifestations of one and the same sovereignty through different channels. As has been said, the one may not harmonize with the other, that is, the expressed will of the legal sovereign may not be that which the political sovereign has commanded, in which case the legal sovereign ought to be reorganized or reconstituted by a new election, otherwise the will of the electorate cannot be made effective. This is nothing more than saying that law ought to conform to public opinion when properly expressed; that the legislator ought to obey the mandate of the electorate; and that when he does not, the electorate and the legislature are out of harmony and should be "reharmonized" by new elections. The problem of good government, says Professor Ritchie, is largely the problem of the proper relation between the legal and the ultimate political sovereignty.[3] Of course, where the principle of the pure democracy prevails, the possibility of this divergence between the will of the legal and political sovereigns is eliminated, for under such conditions the two are identical. In a pure democracy the expressed will of the electorate is not mere opinion or mandate, but law itself. Ordinarily, however, the legal sovereign is organized separate

[1] "Studies in History and Jurisprudence," vol. II, p. 505.

[2] Sidgwick, for example, in his "Elements of Politics," App. A.

[3] "Annals of the American Academy of Political and Social Science," vol. I, p. 402. Cf. also McKechnie: "The will of the legal sovereign is or should be the authorized embodiment or manifestation of the will of the political sovereign. If the popular will is accurately expressed by the legal sovereign, the power of the people is effective, otherwise it is not." "The State and the Individual," p. 131.

and distinct from the political sovereign, and is either some determinate organ like the British Parliament or a constituent body called into existence for the specific purpose of formulating and expressing the sovereign will.

The Distinction in Great Britain

The distinction between legal and political sovereignty is most prominent in those countries like Great Britain whose constitutional enactments proceed from the legislature, where, in consequence, there is no legal distinction between constitutional and statute law.[1] In Great Britain the Parliament is both the ordinary legislative body and the constituent assembly. It is legally omnipotent and subject to no restraints except those of a moral and physical character. There is no person or body of persons in Great Britain capable of making rules which can override or derogate from an act of Parliament. The British Parliament is so omnipotent, legally speaking, says Dicey, that it can adjudge an infant of full age; it may attaint a man of treason after death; it may legitimize an illegitimate child, or, if it sees fit, make a man a judge in his own case.[2] By the act of 1716 it did what only a sovereign body can do, when it prolonged its own existence from three to seven years. It can alter the constitution by the same legal processes that are followed in the enactment of an ordinary statute.

The Sovereignty of Parliament

No court will listen to an argument against the validity of an act of Parliament, even though it be contrary to the most sacred prescriptions of the constitution. It is clear, therefore, that the legal sovereignty of the British state is in the Parliament, and hence there is no legal authority in existence which can restrain it or override its acts.[3]

[1] On the distinction between legal and political sovereignty, between *Staatssouveränität* and *Rechtssouveränität*, see Krabbe, "Die Lehre der Rechtssouveränität," especially ch. 1.

[2] "Law of the Constitution," Second ed., p. 45.

[3] Sidgwick is one of the few writers who is disposed to question the legal omnipotence of the English Parliament. He contends that its sovereignty was not generally accepted until a comparatively recent date, and that even as late as the eighteenth

The Sovereignty of the Electorate

Yet there is a sense in which the English Parliament is not sovereign. There is a power above Parliament whose mandates it must obey and whose will must ultimately prevail in all governmental matters. This is the will pronounced by the electorate at a general parliamentary election. The lawyers do not recognize this sovereignty and the courts do not take notice of it, and even the Parliament itself might for a time lawfully resist it, but in the end, if the electorate insists upon obedience, Parliament must bow before the popular will and enact its commands into law. In this sense the electorate and not Parliament is sovereign.[1]

Limitations upon Sovereignty

While attempting to justify the existence of that sovereignty which has no legal basis, we must not, however, overlook the limitations and conditions under which it is entitled to recognition. The "general will," the "sovereignty of the people," or whatever we may choose to call the controlling power behind the organ through which the will of the state is given legal formulation, are rather vague and loose expressions and when not used with proper discrimination lead to misconception and even to mischief. As Professor Sidgwick has well said, "There is a certain sense in which the mass of the people in any community may be said to be the ultimate depository of supreme political power, though it is misleading to say that the people are everywhere sovereign." [2] To maintain the doctrine of popular sovereignty without restriction is to ignore the fundamen-

century there were to be found dicta of high judges recognizing legal limitations on the power of Parliament. He quotes Holt in support of the proposition that if Parliament should ordain that a person should be a judge in his own case the act would be void. "Elements of Politics," p. 28.

[1] See Austin, "Jurisprudence," vol. I, pp. 252 *et seq.*; Dicey, "Law of the Constitution," pp. 68–69. Cf. also Locke ("Two Treatises of Government," bk. II, ch. 11), who, obviously thinking of the British constitution, calls attention to the fact that while the legislature is the supreme power in the state it is only a "fiduciary power," since there still remains in the people a "superior power to remove or alter the legislature when they find the will of the legislature to be contrary to the will of the people."

[2] "Elements of Politics," p. 630.

tal distinction between power legally exercised and power usurped and illegally exercised. The will of the people expressed otherwise than through legally constituted channels is not sovereign any more than the unofficial opinions of the members of a legislative body are law.[1] The sovereignty of the people has a meaning and is entitled to legal recognition only when it is the sovereignty of the people organized in their legislative bodies or constituent assemblies.[2]

De facto v. De jure Sovereignty

In the next place a distinction may be made between the sovereignty which is actually obeyed by the inhabitants of the state, though it may be without legal basis, and the sovereignty which according to legal right is entitled to the obedience of the people, but of which in fact the bearer may be temporarily dispossessed or which for other reason is incapable of making its will prevail.[3] That person or body of persons who is in fact dominant in the state, who for the time receives the actual obedience of the great mass of the inhabitants, who constitutes the strongest power in the state, is the actual or *de facto* sovereign, though not necessarily the legal sovereign. This sovereign may be a usurping king, a self-constituted assembly, a military dictator, or even a priest or a prophet; in either case the sovereignty rests upon physical power or spiritual influence rather than upon legal right. History abounds in examples of such sovereignties. Cromwell, after he had dissolved the

[1] Compare on this point McKechnie, "The State and the Individual," pp. 131 *et seq.*

[2] It is neither incorrect nor mischievous, says Sir George C. Lewis, to speak of the sovereignty of the people in states in which they are not sovereign, if it be done in a metaphorical sense to signify the moral control and influence over the legislature and if the distinction between legal power and moral influence be kept in mind and real sovereignty be not confused with figurative sovereignty. "Use and Abuse of Political Terms, p. 48. On the proper use of the terms "sovereignty of the people" and "sovereignty of the general will," see Bluntschli, "Allgemeine Staatslehre," bk. VII, ch. 1; and Green, "Political Obligations," pp. 98–104.

[3] On the distinction between legal sovereignty and the "sovereignty of fact," see Esmein, "Droit constitutionnel," 3d ed., p. 187.

Long Parliament, Napoleon, after he had overthrown the Directory, the English convention which offered the crown to William and Mary, the French assembly which made peace with Germany in 1871, the Southern Confederacy from 1861 to 1865, are instances of actual sovereignties which rested upon no legal basis, though some of them ultimately became *de jure* sovereignties through the acquisition of a legal status. The temporary occupation of the part of a state's territory by a hostile army when the commander displaces the local authority and exacts obedience from the inhabitants is another example of *de facto* sovereignty of which history affords many instances.[1] In some of the instances cited above, the usurping sovereign expelled the legal sovereign from his rightful seat and by force compelled the obedience of the inhabitants.

Examples of De facto Sovereignties

It is an established rule of public law that the adherents of the *de facto* sovereign in case of a war between it and the *de jure* sovereign do not incur the penalties of treason and under certain limitations the obligations assumed by it in behalf of the country or the public acts performed by it will be respected by the *de jure* sovereign when it is restored to its rightful place.[2] It is also a rule that where the *de facto* sovereign gives evidence of his ability to maintain his supremacy and command the obedience of the great mass of the people, he shall be morally entitled to receive the recognition of foreign states. Other examples of *de facto* sovereignties occur where the power of the legal sovereign has been superseded by the moral influence of some person, body of persons, or government. Such was the power wielded by the former Shoguns in Japan, and such is the

Rights of De facto Sovereigns and their Adherents

[1] See the decisions of the United States Supreme Court in U.S. *v.* Rice, 4 Wheaton; and Fleming *v.* Page, 9 Howard.

[2] See the case of Thorrington *v.* Smith, decided by the U.S. Supreme Court in 1868, 8 Wallace, p. 1. In this case the Supreme Court held, however, that the Southern Confederacy was not an example of a *de facto* sovereign in the sense that its acts or obligations were binding upon the states or the national government, after the dissolution of the Confederacy.

power exercised by the British government in Egypt today.

De jure sovereignty, on the other hand, has its foundation in law, not in physical power, and the person or body of persons by whom it is exercised can always show a legal right to rule.[1] This is the sovereignty which the law recognizes and to which it attributes the right to govern and exact obedience. It does not depend for its validity upon obedience actually rendered, for the law assumes the obedience to be enforceable. As a matter of fact it may not be the actual sovereign, for it may be expelled, as has been said, from its rightful place or may have temporarily disappeared through disorganization or disintegration; but, however this may be, it has legal right on its side and is lawfully entitled to command and exact obedience. Manifestly, every consideration of expediency, however, requires that the sovereign in actual control should be legally entitled to rule, that is, physical power and mastery ought to rest upon legal right. In reality the sovereign who succeeds in maintaining his claim to rule usually becomes in the course of time the legal sovereign, through the acquiescence of the people or the reorganization of the state, somewhat as actual possession in private law ripens into legal ownership through prescription. On account of the manifest advantages which flow from the exercise of power resting on strict legal right rather than upon mere physical force, the new sovereign sometimes has his *de facto* claim converted into a legal right by election or ratification. This was done, *e.g.*, by William the Conqueror in 1066 and by Napoleon III of France in 1852. Such an act on the part of the new sovereign by thus establishing a legal basis for his power strengthens his moral claim to the obedience of the people and diminishes the danger of conspiracies and rebellions on the part of the adherents of the

De jure Sovereignty

Conversion of Actual Sovereignty into Legal Sovereignty

[1] For other examples of "actual" sovereignties, see Bryce, "Studies in History and Jurisprudence, vol. II. pp. 513–515.

displaced sovereign. There is, as Bryce well observes, a natural and instinctive opposition to submission to power which rests only on force.[1]

II. THE ATTRIBUTES OF SOVEREIGNTY

Permanence of Sovereignty

We may enumerate the distinguishing attributes of sovereignty as permanence, exclusiveness, all-comprehensiveness, absoluteness, inalienability, and unity.

By the quality of permanence or perpetuity (*Ewigkeit*, as the Germans describe it), we mean that quality in virtue of which the sovereignty of the state continues without interruption so long as the state itself exists. It does not cease with the death or dispossession of the temporary bearer, or the reorganization of the state, but shifts immediately to a new bearer, as the center of gravity shifts from one part of a physical body to another whenever it undergoes external change.[2]

Exclusiveness

By exclusiveness we mean that quality in virtue of which there can be but one supreme power in the state, entitled to the obedience of the inhabitants. To hold otherwise would be to deny the principle of the unity and organic nature of the state and to recognize the possibility of an *imperium in imperio*.[3]

All-comprehensiveness

Sovereignty is coextensive in its operation with the jurisdiction of the state and comprehends within its scope

[1] "Studies in History and Jurisprudence," vol. II, p. 516. Austin ("Jurisprudence," lect. VI) refuses to recognize the distinction between *de jure* and *de facto* sovereignty, because, as he says, the adjectives "lawful" and "unlawful" cannot be applied to the term "sovereignty." The only law, he declares, by which a person or body of persons can be sovereign is its own law, its own command or will, and hence to say that a person or body is the *de jure* sovereign is tantamount to saying that it is legal because it declares itself so to be. According to Austin's view *governments* may be *de facto* or *de jure*, but the latter terms are inapplicable to sovereignty. Compare Merriam, "History of Sovereignty since Rousseau," p. 147.

[2] Compare Von Mohl, "Encyklopädie der Staatswissenschaften," sec. 16, Jellinek, "Staatenverbindungen," p. 35. The idea of continuity is expressed by the old French proverb, "Le roi est mort; vive le roi."

[3] Von Mohl, *op. cit.*, pp. 118–119. Cf. also Burgess, *op. cit.*, vol. I, p. 52.

all persons and things in the territory of the state. The modern state does not recognize the existence of any *staatlos* person within its jurisdiction. For reasons of public policy and international comity civilized states voluntarily relinquish the exercise of jurisdiction over the diplomatic representatives of foreign states residing within their territories, but this rule of extraterritoriality, as it is called, is no exception to the principle stated above. The fact that states have until comparatively recent times declined to recognize the principle of extraterritoriality, and that even now any state may expel a diplomatic representative from its territory and thus deprive him of his immunity, are evidences of the truth of the proposition that the sovereignty of the state is all-embracing and all-comprehensive.

Absolutism

By the quality of absolutism we mean simply that sovereignty is legally unlimited, that is, it is subject to no higher power — an attribute which results from the very nature of the thing itself. To hold otherwise would be to assume the existence of a higher power by which the sovereign is limited.[1]

Inalienability

By the quality of inalienability we mean that attribute of the state by virtue of which it cannot cede away any of its essential elements without self-destruction.[2] Sovereignty can no more be alienated, says Lieber, than a tree can alienate its right to sprout, or a man can transfer his life or personality to another without self-destruction.[3] Rousseau holds the same view, though he admits that *power* may be transferred.[4] A few writers, however, take the contrary view. Professor Ritchie, for example, declares that the doctrine of inalienability is

[1] Compare Von Mohl, *op. cit.*, p. 120.

[2] See Bateman," Political and Constitutional Law," sec. 125.

[3] "Political Ethics," vol. I, p. 219; cf. Duguit, "Droit constitutionnel," p. 131. The doctrine of inalienability of sovereignty is asserted in the French constitutions of 1791 (Tit. III, sec. I), 1793 (Decl. 25), and 1848 (ch. I, sec. I).

[4] "Contrat social," bk. II, ch. I.

belied by the facts of history.[1] Of course it is not meant that where a state parts with a portion of its territory it retains its sovereignty over the territory alienated. History abounds in examples of territorial cessions involving the alienation of the sovereignty of the state over the territory ceded, but that is a different thing from saying that the state may cede away its sovereignty as such; that is, part with a constituent element without which it could no more exist than a man without heart or blood. Nor does the principle of inalienability mean that the person or persons in whom the sovereignty is for the time reposed may not abdicate. The British Parliament, for example, might dissolve itself without making any provision for calling another Parliament, or the Czar of Russia might voluntarily relinquish his rights of sovereignty in favor of a Duma, as he seems to have in fact lately done; but there would not be in either case an alienation, but only a shifting of the repository or abiding place.

Imprescriptibility

Implied in the principle of inalienability of sovereignty is that of imprescriptibility, according to which sovereignty cannot be lost by mere lapse of time, as property in land may be lost by prescription at private law.[2] There is an old doctrine held by some writers that originally the people were sovereign everywhere, but through the long and uninterrupted usurpation of sovereign power by kings it was gradually lost to the people by operation of the principle of prescription. But the theory has little evidence to support it.

III. THE ABSOLUTISM OF SOVEREIGNTY; THEORY OF LIMITATIONS

Sovereignty cannot be Limited

Among the characteristics of sovereignty which merit a more extended consideration than we have given in the

[1] Note to the English translation of Bluntschli's "Allgemeine Staatslehre" (Theory of the State, 2d ed.), p. 496.

[2] Compare Duguit, *op. cit.*, p. 133.

preceding section is the quality of absolutism. Sovereignty cannot be limited; it is an original, not a derived power. As it is the supreme power in the state, there cannot, legally speaking, be any authority above it, and to speak of it as being limited by some higher power is a contradiction of terms. Sovereignty, as Jellinek remarks, can be bound only by its own will, that is, it can only be self-limited.[1]

Doctrine of Moral Limitations

While from the very nature of the case sovereignty cannot be subject to legal restrictions, many writers recognize the existence of certain moral limitations on the power of the sovereign, arising from the natural and inherent rights of man — rights which, according to the views of some authorities, exist independently of the state and cannot therefore be restricted or limited by it.[2] Thus, observes a well-known writer, "although . . . some of those who have written on sovereignty described the sovereign as being subject to no restraint whatever, his sole will being absolutely dominant over all his subjects, there has never really existed in the world any person or even any body of persons enjoying this utterly uncontrolled power, with no external force to fear and nothing to regard except the gratification of mere volition."[3] The same assertion is made by Bluntschli, who declares that "there is no such thing on earth as absolute independence. . . . Even the state as a whole is not almighty, for it is limited externally by the rights of other states and internally by its own nature and by the rights of its individual members."[4]

Divine Limitations

Some writers maintain that the sovereignty of the state is limited by the prescriptions of the divine law, or by the power of some superhuman authority. The Russian publicist Mar-

[1] "Lehre von den Staatenverbindungen," pp. 35–36.

[2] "The vast mass of influences," says Maine, "which, for short, we may call moral, perpetually shapes, limits, or forbids the actual direction of the forces of society by the sovereign." "Early History of Institutions," p. 359.

[3] Bryce, "Studies in History and Jurisprudence," vol. II, p. 523.

[4] "Allgemeine Staatslehre," bk. VII, ch. I.

tens, for example, in his definition of sovereignty recognizes in God a "legal superior" over a state otherwise "entirely sovereign."[1] Bluntschli asserts that nations are "responsible to the eternal judgments of God" as well as to "the facts of history." "There is above the sovereign," says the German writer Schulze, "a higher moral and natural order, the eternal principle of the moral law." The doctrine that the state is absolutely supreme and incapable of doing wrong is, he says, fallacious and dangerous.[2] Other alleged limitations on sovereignty are those arising from the law of nature,[3] the principles of morality, the teachings of religion, the principles of abstract justice, immemorial custom, long-established traditions, etc. To these have been added the limitations imposed by the rules of international law, the particular restrictions imposed by conventions between states, and limitations imposed by states themselves by their fundamental law, such, for example, as the method of procedure for altering their constitutions.[4]

[1] "For a state to be entirely sovereign," says Martens, "it must govern itself and acknowledge no legislative superior power but God;" quoted by Lewis, "Use and Abuse of Political Terms," p. 41. For an argument against the proposition that sovereignty is unlimited see Benjamin Constant, "Politique constitutionnelle," vol. I., ch. 1., especially pp. 15–16.

[2] "Deutsches Staatsrecht," vol. I, sec. 16. See also Von Mohl ("Encyklopädie der Staatswissenschaften," p. 117), who does not accept as a literal truth the Biblical doctrine of obedience to God rather than man, though he attaches great significance to the idea.

[3] Speaking of the universal binding force of the law of nature, Blackstone said, "No human laws are of any validity if contrary to this, and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original." "Commentaries," ed. by Chase, pp. 5–6.

[4] On the subject of limitations on sovereignty see Bryce, *op. cit.*, vol. II, pp. 510 *et seq.*; Bentham, "Fragment on Government," chs. 34–36; Works, vol. I, pp. 289–291; Ritchie, "Annals of the American Academy of Political and Social Science," vol. I, p. 393; Laveleye, "Le Gouvernement dans la Démocratie," vol. I, bk. I, ch. 6; Woolsey, "Political Science," vol. I, p. 203; Sidgwick, "Elements of Politics," p. 623; Lowell, "Essays on Government," ch. 5; Dicey, "Law of the Constitution," pp. 70–74; Duguit, "Droit constitutionnel," pp. 122 *et seq.* Some French writers like Cousin, Guizot, Constant, and Royer-Collard have worked out a theory of the "sovereignty of reason or justice." For a discussion

Restrictions on Sovereignty

It must, of course, be admitted that in a certain sense the exercise of sovereignty is subject to restrictions. The most despotic monarch respects the opinions of his subjects on certain questions and often bows to their wishes. Probably no sovereign, whether monarch or assembly, ever existed who assumed and exercised the right to change any law, custom, or institution at his pleasure without regard to the opinions of the mass of the population. All sovereignty, in short, must be conditioned upon the ready obedience or acquiescence of those over whom it is exercised.[1] The sultan of Turkey, for example, absolute as he is, would hardly dare interfere with the religion of his subjects; the British Parliament, with power legally unlimited, would hesitate to tax the colonies, or to pass a decennial act, or to establish the Episcopal Church in Scotland; it is doubtful if any Roman emperor would have dared to subvert the national religion of Rome; Louis XIV, who is credited with having boasted that he was the state, would probably never have been able to force Protestantism on his subjects.

Such Limitations have no Legal Effect

An examination of these limitations, however, will show that legally they are no restrictions on sovereignty at all. The law of nature, the principles of morality, the laws of God, the dictates of humanity and reason, the law of nations, the fear of public opinion, and all the other alleged restrictions on sovereignty have no legal effect, except in so far as the state chooses to recognize them and give them force and validity. They are not such limitations as the courts will ordinarily enforce in the decision of legal controversies. Thus, if the English Parliament, which is the legal sovereign in the British Empire, should pass an act opposed to

and criticism of the theory see Bluntschli, *op. cit.*, bk. VII, ch. 1; also Merriam, "History of Sovereignty," ch. 5.

[1] Bryce, in the chapter on "Government by Public Opinion" in his "American Commonwealth," observes that "governments have always rested and must rest, if not on the affection, then on the reverence or awe, if not on the active approval, then on the silent acquiescence, of the numerical majority."

the principles of morality or contrary to the rules of international law, however repugnant the statute might be to the moral sense of the people or their ideas of justice and good faith, it would not be legally invalid. The courts would presume that Parliament did not intend to violate the rules of morality or the principles of international law, and they would not listen to an argument which rested on the assumption that Parliament had exceeded its authority.[1] If in any case the limitations of the divine law are recognized, the state in the last analysis must be the interpreter of the divine will, so that in fact the restriction is nothing but a self-limitation. In other words the principles of morality, of justice, of religion, etc., so far as they constitute limitations on the sovereign, are simply what the consciousness of the state decides them to be, for there can be no other legal consciousness than that of the state.

Limitations of International Law

Regarding the so-called limitations on sovereignty imposed by the principles of international law, we are forced to the same conclusion, namely, that in the last analysis they are nothing more than "self-limitations." [2] The subjects of international law are sovereign states, and in the last resort they must be considered as the interpreters of their own rights and of their obligations to other states. There is no higher legal power to enforce the obligations which the public opinion of the civilized world may declare to be binding upon them. States are subject only to their own wills, not to any outside will. Juristically speaking, the state has an undoubted right to refuse to be bound by

[1] Dicey, "Law of the Constitution," p. 59.

[2] The courts of Great Britain, *e.g.*, hold that no principle of international law is enforceable in a British court until it has been formally adopted into the body of municipal law by an act of Parliament. See the recent case of West Rand Gold Mining Company *v.* Rex, discussed in the "American Journal of International Law," vol. II, pp. 223 ff. See also an article as to the American practice on this point, entitled "The Legal Nature of International Law," by W. W. Willoughby, in the "American Journal of International Law," vol. II, No. 2.

a particular usage of international law, and as a matter of fact the courts of most countries are bound to give precedence to municipal statutes in preference to the prescriptions of international law, even though the former are contrary to the latter.[1] And so as regards the obligations of the state which it may have imposed upon itself by express convention with other states. They are not legal limitations on the sovereign power, but conventional agreements which the state may disregard or even repudiate so far as its legal right to do so is concerned. The same may be said of the alleged limitations set by the state upon the manner in which its powers shall be exercised, such, for example, as the method of procedure which it may have prescribed for making changes in its own constitutional organization. Such rules of procedure cannot be considered as legal restrictions upon the sovereignty of the state, and it is a matter of common knowledge that such provisions have in the past been time and again set aside for other methods.

The inevitable conclusion, therefore, to which we are led, is that all attempts to place legal restrictions upon sovereignty are futile and useless. Whoever or whatever can impose limitations on the power of the state is itself the sovereign, and not until we reach that power which is unlimited do we come into the presence of the sovereign. Supreme power, limited by positive law, says Austin, is a flat contradiction in terms.[2]

The doctrine of unlimited sovereignty is sometimes criticised on the ground that it leads to the legal despotism of the state. But granting *arguendo* that sovereignty may be limited in the interest of liberty or good government, we are no better off. We are still brought face to face with another

[1] It is a rule of the English and American courts, however, in such cases, to construe the statute, if possible, in such a way as not to violate the rule of international law.

[2] "Jurisprudence," lect. VI; see also Burgess, *op. cit.*, vol. I, p. 53. This is the view of such high authorities as Esmein, Markby, Holland, E. C. Clark, Ihering, and Funck-Brentano.

sovereign, namely, that which imposes the limitation — the very thing from which we are seeking to escape. John Austin, with his usual clearness and incisiveness, stated the matter correctly when he said: "The power of the superior sovereign imposing the restraints on the power of some other sovereign superior to that superior would still be absolutely free from the fetters of positive law. For unless the imagined restraints were ultimately imposed by a sovereign not in a state of subjection to a higher or superior sovereign, a series of sovereigns ascending to infinity would govern the imagined community, which is impossible and absurd." [1]

It is difficult to see what is to be gained by trying to avoid such a conclusion. It is necessary to recognize in the state a power to which all things and all wills are potentially subject, otherwise the state is no different fundamentally from the other associations and organizations into which mankind is grouped. But this recognition does not imply an admission of the moral right of the state to control and regulate all the interests and activities of the people over whom sovereign power potentially exists. In all modern states there is a large group of interests, a wide domain of human conduct, which are in fact exempt from all governmental interference. There is no likelihood that the state will ever exercise all of the power which legally belongs to it. Considerations of expediency, to say nothing of justice, require that in practice the greater part of its power should exist only *in potentia*, and that the individual should be left free from governmental control within a certain sphere. Any sovereign, whether monarch or assembly, which should attempt to exercise its undoubted legal power to regulate all the interests and relations of human life would soon be overthrown by revolution.

It is difficult to see how the doctrine of unlimited sovereignty is inconsistent with the idea of the widest liberty.

[1] "Jurisprudence," Students' ed., p. 105.

Unlimited Sovereignty compatible with Liberty

It does not require profound thinking to see that the more fully and completely sovereign the state, the more secure and permanent must be the liberty of the people.[1] During the eighteenth century the sovereignty of the state was generally confused with the absolutism of particular kings, and therefore the doctrine of unlimited sovereignty had few defenders except among those who, like Hobbes, were the apologists of certain princes who sought to rule without regard to constitutional restrictions. With the disappearance of absolutism in government and the general introduction of constitutionalism, however, the theory of the unlimited sovereignty of the state came to have more advocates than opponents. When the state came to be organized outside of the government and sovereignty was understood in its true light, namely, as an attribute of the former rather than of the latter, it became an easy matter to reconcile the doctrine of an unlimited sovereignty with that of a limited government.

IV. THE INDIVISIBILITY OF SOVEREIGNTY

Theory of a Divided Sovereignty

Another characteristic of sovereignty which requires more detailed consideration is the quality of unity. Being the highest will in the state, it cannot be divided without producing several wills, which is, of course, inconsistent with the notion of sovereignty. The existence of several supreme wills, each capable of issuing commands and of exacting obedience, would obviously result in conflicts and an ultimate paralysis of the state. If the several supposed wills were coördinate, obviously neither could be sovereign; if one were superior and the others subordinate, manifestly the former would be sovereign and the latter subject, and what would appear to be a division of sovereignty would in fact be no division. By no one has this truth been more forcibly set forth than by the American statesman John

[1] Cf. Burgess, "Political Science and Constitutional Law," vol. I, pp. 55 ff.

C. Calhoun, in his "Disquisition on Government," written in 1851. "Sovereignty," he declared, "is an entire thing; to divide it is to destroy it. It is the supreme power in a state, and we might just as well speak of half a square or half a triangle as of half a sovereignty." [1] But this view is by no means universally accepted by publicists and political writers of to-day. The existence of a large number of petty states on the continent of Europe during the sixteenth and seventeenth centuries, which were practically, though not theoretically, independent, contributed to the spread of the popular belief in the distinction between part-sovereign and fully sovereign states — a distinction which rests in fact on the notion of a divided sovereignty.[2] In more recent times the organization of so-called composite states, confederations, real unions, and federal states, and the establishment of such relationships as are involved in the creation of protectorates, have powerfully strengthened the divisibility theory.[3]

Dual Sovereignty in the United States

The question of a dual sovereignty first became a controversy of practical politics in the United States of America toward the middle of the nineteenth century. Under the Articles of Confederation each member of the union expressly retained its own sovereignty, so that the possibility of mis-

[1] Works, vol. I, p. 146.

[2] Cf. Oppenheim, "International Law," vol. I, p. 105.

[3] Recent political developments in various parts of the world have given rise to situations which in the opinion of some writers furnish instances of ambiguous sovereignty. An example was formerly found in Manchuria, which is politically a part of China, though from 1900 to 1905 it was administered by Russia in accordance with treaties. Likewise Bosnia and Herzegovina have since 1878 been under the administration of Austria-Hungary, though under the nominal sovereignty of the Turkish Empire. The island of Cyprus, since 1878 nominally a part of Turkey, though under the administration of England, is another example. There is also the peculiar situation described as *condominium*, where two states exercise sovereignty conjointly over the same territory, an example of which was the joint occupation and administration of Schleswig-Holstein by Austria and Prussia from 1864 to 1866. Another example is the joint sovereignty of Belgium and Prussia today over Moresnet (Kelmis). See Oppenheim, "International Law," vol. I, pp. 220–223.

understanding was avoided. But the constitution of the federal union of 1789 was silent on this all-important subject, hence, the questions were left open as to whether sovereignty remained in the individual states where it had formerly rested, whether it was in the united state created by their joint agency, or whether it was divided between the individual states on the one hand and the union on the other. This *casus omissus* was doubtless the result of a compromise between the conflicting forces of particularism and nationalism in the convention which framed the constitution.[1]

Early Opinions

The theory of a dual sovereignty under the American federal system was generally held by publicists in America at the time of the adoption of the constitution, it was enunciated in the "Federalist"[2] by Hamilton and Madison, and was adopted at an early date by the Supreme Court, which held that the United States was sovereign as to the powers which had been conferred upon it, and that the states were sovereign as to those which were reserved to them, and this view is still maintained by the court.[3] It has received the approval of such eminent constitutional lawyers as Judges Cooley[4] and Story[5] and political writers like De Tocqueville, Wheaton, Halleck, Hurd, Bliss, and many

[1] For the view that the founders of the republic deliberately evaded the responsibility of formulating their will on this important question rather than insist upon an answer that probably would have resulted in the rejection of the constitution, see an article by A. W. Small, entitled, "The Beginnings of American Nationality," in the "Forum" for June, 1895. For a contrary view, see Willoughby, "Nature of the State," p. 271.

[2] See Nos. 32 and 39. The sovereignty, said Madison, is divided between the states on the one hand and the union on the other, so that "the whole sovereignty consists of a number of partial sovereignties."

[3] Chisholm *v.* Georgia (1792), 2 Dallas 435. In this case the Supreme Court declared that "the United States are sovereign as to all the powers of government actually surrendered by the states, while each state in the union is sovereign as to all powers reserved." See also Ware *v.* Hylton, 3 Dallas 232; and the License cases, 5 How. 504, 538.

[4] "Constitutional Limitations," p. 4.

[5] "Commentaries," secs. 207–208.

others.[1] "There is no question," says Hurd, "that the statesmen of all sections who made the constitution of the United States understood that political sovereignty was capable of division according to its subject and powers."[2] Their view was that the sovereignty was divided between what they called the "nation" on the one hand and the states on the other; that is, each was sovereign within the sphere marked out for it by the constitution of the union.

Calhoun's Theory

This theory of a dual sovereignty was vigorously combated by the Southern statesman John C. Calhoun, in his "Disquisition on Government," where, as already stated, he enunciated the doctrine that sovereignty was a unit, incapable of division, and that it existed unimpaired and in its entirety in the separate states composing the union. The question, so far as the United States was concerned, was finally settled by the armed conflict of 1861–1865, but there is still a difference of opinion among able writers as to whether the power which is left to the states is sovereignty or mere local autonomy.[3]

Views of Foreign Publicists

Among foreign publicists we find the same diversity of opinion regarding the divisibility of sovereignty. The English historian Freeman asserts that "the complete division

[1] For further discussion of this subject, see Merriam, "American Political Theories," ch. 7, also his "History of Sovereignty," pp. 163 ff.; Willoughby, "American Constitutional System," ch. 2; McLaughlin, "American Historical Review," April, 1900; see also a good recent discussion in the "Zeitschrift für die gesamte Staatswissenschaften," 1909, pp. 77 ff. Mr. A. L. Lowell asserts emphatically that "there can exist within the same territory two sovereigns issuing commands to the same subjects touching different matters." "Essays on Government," p. 219. James Bryce maintains that legal sovereignty may be "divided between coördinate authorities." "Studies in History and Jurisprudence," vol. II, p. 508.

[2] "Theory of the National Existence," p. 295. For a somewhat detailed co sideration of the question of the divisibility of sovereignty, see Bliss, "On Sov ereignty" chs. 7–8.

[3] Woodrow Wilson attributes to the individual members of the American union the character of real states, although he says their sphere is limited by the presiding sovereign powers of a state superordinated to them. "Old Master and Other Essays," p. 94. The constitution of Mexico (art. 40) expressly declares the individual states to be "sovereign" in all that concerns their internal affairs.

of sovereignty we may look upon as essential to the absolute perfection of the federal ideal." [1] The French scholars De Tocqueville, Esmein, and Duguit have expressed substantially the same views;[2] and many German publicists support the theory so far as it relates to sovereignty in federal states. The "father" of the divisibility doctrine in Germany was the noted scholar Waitz, and among his followers may be mentioned the names of Von Mohl, Bluntschli, Brie, Westerkamp, Jellinek, Bornhak, Schulze, Rüttiman, and others.[3] After the founding of the empire, however, and the triumph of nationalism over particularism, the theory of a divided sovereignty found less favor among the German jurists and philosophers, and the unity theory has come to have more advocates than formerly.[4] According to the latter view, sovereignty in the German Empire reposes in the totality of the German states regarded as a single personality instead of being divided between the empire, on the one hand, and the states composing it, on the other. When the latter became members of the empire, they gave up their sovereignty, receiving in exchange, as Bismarck expressed it, a share in the joint sovereignty of the empire.[5] While the better opinion is in favor of the theory that sovereignty is a unit and therefore incapable of division, there is no reason why the expression of the powers of sovereignty, its emanations or manifestations, cannot be divided and expressed through various mouthpieces and

[1] "History of Federal Government," p. 4, see also p. 15.

[2] Esmein, "Droit constitutionnel," 4th ed., p. 7; Duguit, "Droit constitutionnel," pp. 134, 141. See also Oppenheim, "International Law," vol. I, p. 134.

[3] For discussions of this question see especially Brie, "Der Bundesstaat," sec. 10; Bornhak, "Preussische Staatsrecht," vol. I, pp. 71 ff.; and Merriam, "History of Sovereignty," pp. 204 ff.

[4] Among the German advocates of the unity theory may be mentioned Gareis, Haenel, Laband, Zorn, Georg Meyer, and Martitz.

[5] Howard, "The German Empire," pp. 20, 116. Seydel, like Calhoun in America, maintained that the individual states of the empire are sovereign, that they are real states, and that the empire itself is no state. See his "Kommentar zur Verfassungsurkunde," 2d ed., pp. 6–11.

The Manifestations of Sovereignty may be divided

carried out through a variety of organs. Thus, said Rousseau, power may be divided, though will never can be. It is a unit and indivisible. Those who maintain the divisibility theory, as Rousseau points out, really confuse sovereignty with its emanations.[1] The same idea was expressed by Calhoun, who said with evident truth: "There is no difficulty in understanding how powers appertaining to sovereignty may be divided and the exercise of one portion be delegated to one set of agents and another portion to another, or how sovereignty may be vested in one man, in a few, or in many. But how sovereignty itself, the supreme power, can be divided . . . it is impossible to conceive." [2]

Sovereignty in States having the Federal System of Government

Applying this principle to the so-called federal state, we shall find that the sovereign will expresses itself on certain subjects through the medium of a central government, and on certain other subjects through the organs of the individual political units composing the federation. But there is no partition of sovereignty, no division of the supreme will. There is a division by the sovereign itself of governmental powers and a distribution of them among two sets of organs, but no division of the will itself. To say that the component members of a federal union are partly sovereign, or sovereign within their particular spheres,

[1] "Le Contrat social," bk. II, ch. 2.

[2] Works, vol. I, p. 416. Compare also Willoughby ("The American Constitutional System," pp. 4–5): "That there cannot be in the same being two wills, each supreme, is obvious. But though the sovereign will of the state may not be divided, it may find expression through several legislative mouthpieces, and the execution of the commands may be delegated to a variety of governmental organs." Compare also George Ticknor Curtis, who says ("History of the Constitution," vol. II, pp. 377–379): "It is manifest that there cannot be two supreme powers in the same community if both are to operate on the same objects. But there is nothing in the nature of political sovereignty to prevent its *powers* from being distributed among different agents for different purposes." For similar views see Hurd, "Theory of our National Existence," p. 121; Gareis, "Allgemeine Staatsrecht," p. 31; and Funck-Brentano ("La Politique," p. 68), who maintain that though sovereignty cannot be divided, its *functions* may be and its *authority* may be delegated, the forms of delegation being as infinite as the passions and human wills.

is an abuse of the term "sovereignty." Juristically it is just as logical to say that a municipal corporation or a religious society is sovereign within the sphere assigned to it by the law.

"There is no middle ground," says an able writer, speaking of the nature of sovereignty in the American federal system; "sovereignty is indivisible, and either the central power is sovereign and the individual members not, or *vice versa*. They are not states, for that would be *imperia in imperio*, but they are administrative districts with larger powers of autonomy than are given others — an autonomy which amounts to practical local self-government in matters not of general concern."[1] Legally this is an absolutely correct statement of the status of the so-called states of the American federal republic. That power and that power alone is sovereign in a federal union which can in the last analysis determine the competence of the central authority and that of the component states, and which can redistribute the powers of government between them in such a way as to enlarge or curtail the sphere of either. That power is not in the central government nor in the states; it is over and above both, and wherever it is, there is the sovereign.

The task of "running the sovereign to cover," especially in the "composite" states of to-day, is not always easy, and when discovered it is not always recognized. It is extremely difficult to place one's finger on the exact spot where it reposes. The constitutional lawyer and the layman do not always travel the same path in the search for it, and they do not always find it in the same place. But it is always present somewhere in the state; and if in the search we push our inquiry until we find that authority which has the power to say the last word in all matters of authority, we shall find ourselves in the presence of the sovereign.

[1] Willoughby, "The Nature of the State," p. 244.

V. INTERNAL VERSUS EXTERNAL SOVEREIGNTY[1]

The fact that the state has an international personality and exerts a will in relation to other states has given rise to the common distinction between external and internal sovereignty, between sovereignty as a concept of international law and sovereignty as a concept of constitutional law. Those who recognize the distinction conceive internal sovereignty to mean the supremacy of the state within its own territory as over against the wills of all persons or associations of persons therein; while external sovereignty is conceived to be the supremacy of the state as against all foreign wills, whether of persons or states. The one has reference to the exclusive power of the state viewed from within, the other to the immunity of the state from outside control. Many writers, especially those on international law, maintain that the two sovereignties are separate and distinct, and that the state may possess one without the other; that is, the state may be internally sovereign without being sovereign in its external relations. The logical conclusion is that states may be sovereign as to certain things and non-sovereign as to others; in other words, that sovereignty is divisible and admits of different degrees of perfection — a conclusion which we have already shown to be untenable.[2] Georg Meyer, a noted German scholar, distinguishes between constitutional sovereignty and international sovereignty; the former being the power of "unrestrained political action" as regards internal

[1] On the distinction between external and internal sovereignty, see Wheaton, "International Law," ch. 2; Oppenheim, "International Law," vol. I, part I, ch. 1; Hall, "International Law," ch. 2, sec. 10; Duguit, "Droit constitutionnel," sec. 28; Merignhac, "Traité de Droit international public," vol. I, pp. 162 ff.; Pradier-Fodéré, "Traité de Droit international public," vol. I, p. 160; Despagnet, "Droit international public," 3d ed., p. 82; Merriam, "History of Sovereignty," p. 216.

[2] The German jurists Laband, Jellinek, Rehm, and the French writer Moreau all agree in holding that sovereignty is not divisible into external and internal "branches," to use Wheaton's term, and that a state cannot possess the one without the other. See Duguit, "Droit constitutionnel," p. 114.

affairs, the latter being independence of foreign control.[1] But if a state possesses the power of unrestrained political activity in internal affairs, it cannot at the same time be dependent upon an outside will. That would, as Jellinek remarks, be a *contradictio in adjecto*.[2] The distinction between international or external sovereignty on the one hand, and internal or constitutional sovereignty on the other, is, according to strict logic, unsound. The former is but the outward reflex action of the highest power in the state, the manifestation of its supremacy in a particular direction. In other words, external and internal sovereignty are simply different aspects or manifestations of one and the same thing.[3] One may be considered the positive side of sovereignty, the other its negative side. Or, to state it in a different form, one is the supremacy of the state viewed from the exterior, the other the same supremacy looked at from within.

The Distinction is Unsound

VI. IS SOVEREIGNTY AN ESSENTIAL ELEMENT OF THE STATE?

The Right to Govern, the real Test of State Existence

Many able writers, particularly among the Germans, maintain that while sovereignty is a common attribute of the state it is not an essential constituent; in other words, that states and sovereign states are not necessarily identical concepts. Sovereignty, they assert, may or may not be present in the state; it may constitute the basis of recognition in international law, but is in itself an insufficient test of statehood.[4] They distinguish between sovereignty (*Staatshoheit* or *Hoheitsrecht*), the power of the state to determine the limits of its own competence, and state

[1] "Lehrbuch des deutschen Staatsrechts," sec. 6.

[2] "Staatenverbindungen," p. 23.

[3] Compare Oppenheim, "International Law," vol. I, p. 171. See also Esmein ("Droit constitutionnel," p. 1), who says sovereignty has two "faces," internal sovereignty, or the right to command all citizens in the territory of the state; and external sovereignty, or the right of representing the nation and entering into relations with other nations.

[4] Cf. Howard, "The German Empire," p. 20, and the authorities there cited.

power (*Herrschaft*), or the right to rule, which is possessed by every state, while only certain states possess the former. Communities, like the component members of federal unions, for example, which were once independent and which have never surrendered their essential marks of existence, but have only delegated certain powers of government to a central authority, are cited as examples of states without sovereignty. In becoming parts of a new union they have ceased to be sovereign but have not ceased to be states.[1] Thus Jellinek maintains that a community which exercises political power according to its own right, that is, power which is original rather than derived and which can lay down binding legal norms, is in a juristic sense a state, whether it possesses full sovereignty or not.[2] They are, he says, public law corporations, have their own constitutions, their own independent spheres of action, and retain their magisterial rights (*Hoheitsrechten*).[3] Other authorities who hold the view that sovereignty is not a vital principle in the constitution of the state are Laband,[4] Rehm,[5] Georg Meyer,[6] von Mohl, Le Fur und Posener,[7] Hermann Schulze,[8] Brie,[9] Anschütz, Bluntschli,[10] and the French writers Michoud[11] and Lapradelle.[12] According to these writers the distinguishing char-

[1] Cf. Merriam, "History of Sovereignty," p. 200.

[2] "Staatenverbindungen," p. 40. [3] *Ibid.*, p. 49.

[4] "Staatsrecht des deutschen Reiches," vol. I, pp. 107–108. For a searching criticism of Laband's conception, see Burgess's review of his theory in the "Political Science Quarterly," vol. III, pp. 123 *et seq.*

[5] "Allgemeine Staatslehre," in Marquardsen's "Handbuch," Einleitungsband, sec. 16.

[6] "Lehrbuch des deutschen Staatsrechts," 6th ed., p. 7. "Sovereignty," says Meyer, "is no essential constituent of the state. There are sovereign and non-sovereign states."

[7] "Bundesstaat und Staatenbund," p. 2. [8] "Deutsches Staatsrecht," sec. 16.

[9] "Theorie der Staatenverbindungen," p. 9. "The members of a federal union," observes Brie, "are really states but not sovereign states," p. 112.

[10] "Völkerrecht," sec. 79.

[11] "Théorie de la Personnalité morale," p. 239.

[12] "La Question finlandaise," "Revue de Droit public," 1901.

acteristic of the state is, as has been intimated, not sovereignty, not the original power of the state to determine its own competence, but the power to command and compel obedience. A community which rules and governs in its own right, says Jellinek, is a state, and non-sovereign as well as sovereign communities may do that.[1] There were many communities during the Middle Ages, he says, which were tributary or vassal, like the great feudal seignories of France, yet were recognized as states.

Sovereignty is an Essential Constituent of the State

But if the possession of political power (*Herrschaft*) is a sound test of statehood, it is difficult to see why provinces possessing large autonomy, or self-governing colonies like Australia, Canada, or New Zealand, do not equally possess the quality of states.[2] Whether sovereignty is an essential characteristic of the state depends mainly upon our notion of the thing itself and our conception of the nature of the state. If we accept the theory of a divided sovereignty, or the distinction between perfect and imperfect states, we need have no trouble in accepting the doctrine that a community in which sovereignty is partly lacking may nevertheless be considered as a state. But if we adhere to the test laid down elsewhere in this work, no non-sovereign community, however great its local autonomy, is entitled to be treated as a state. We agree with Zorn and Burgess that sovereignty is not only an essential element, but the first and highest conceivable mark of the

[1] "Staatenverbindungen," pp. 30, 37. For a criticism of Jellinek's views on this point, see Merignhac, "Traité de Droit international public," vol. I, pp. 178–183.

[2] Cf. Duguit, *op. cit.*, pp. 137, 140; also Gierke in "Schmollers Jahrbuch" for 1883, p. 1137; Merignhac, *op. cit.*, vol. I, pp. 173 *et seq.*; and Burgess, "Political Science Quarterly," vol. III, p. 123. Jellinek, Laband, and Rehm argue that the members of federal states differ from self-governing colonies in that their power is original and underived, that they have the power of self-organization, inherent autonomy, etc., while the powers of colonies are merely delegated and hence the latter cannot be considered as states. This distinction is good so far as the members of some federal states are concerned, but how about those like the Canadian province which have granted rather than reserved rights?

state;[1] and with Willoughby that it is the one characteristic which serves to distinguish the state *in toto genere* from all other human associations.[2] There are many communities, among them the constituent members of some federal unions and the great English self-governing colonies, which have an autonomy amounting almost to independence in the management of their local affairs, yet they are not free to determine their own competence or the limits of their own autonomy. It would seem, therefore, more accurate to treat such communities not as states, but as parts of states, possessing some, but not all, of the marks of real states.

VII. AUSTIN'S THEORY OF SOVEREIGNTY

Austin's Conception of Law

A conception of sovereignty which has been the subject of wide discussion and which has exerted an important influence upon the legal thought of the last half century is that enunciated by the analytical school of jurists of which John Austin was the most conspicuous representative. Austin's views were based largely on the teachings of Hobbes and Bentham, and were first made public in his "Lectures on Jurisprudence," published in 1832. His theory was conditioned mainly upon his view of the nature of law, which he defined in a general way as a "command given by superior to an inferior." [3] "If a determinate human superior," he declared, "not in a habit of obedience to a like superior receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent." "Fur-

[1] "Deutsches Staatsrecht," vol. I, sec. 54; Burgess, "Political Science Quarterly," vol. VII, p. 128.

[2] "The American Constitutional System," pp. 4–5. Cf. Borel, "Étude sur la Souveraineté," p. 103, who holds that members of federal states are not themselves states in the juridical sense because sovereignty is an essential characteristic of statehood. See also Le Fur, "État fédéral," pp. 680 *et seq.*

[3] Lectures on Jurisprudence," lect. VI.

thermore," he continued, "every positive law, or every law simply and strictly so-called, is set, directly or circuitously, by a sovereign person or body to a member or members of the independent political society wherein that person or body is sovereign or supreme."

The test of sovereignty, then, according to Austin, is habitual obedience to a superior who owes no obedience to a like superior — not obedience by all the inhabitants, but by the "bulk" of the members of the community. This superior cannot be the general will, as Rousseau taught, nor the people in the mass, nor the electorate, nor some abstraction like public opinion, moral sentiment, the common reason, the will of God, and the like; but it must be some "determinate" person or authority which is itself subject to no legal restraints.

Criticism of Austin's Theory

Austin's theory that sovereignty must reside in a determinate body has found many critics among the historical jurists like Maine, Clark, Sidgwick, and others. In the first place, the theory is criticised on the ground that it is inconsistent with the present-day idea of popular sovereignty — is in fact the complete antithesis of Rousseau's doctrine that sovereignty is the general will, a doctrine which lies at the basis of the modern democratic state. Again, it ignores the power of public opinion, and takes no account of what we have described as political sovereignty. Thus, says Sir Henry Maine, it is a historic fact that sovereignty has repeatedly been for a time in the hands of a number of persons *not* determinate, and, he adds, "it is asserted by some writers that this is true of the abiding place of sovereignty in the republic of the United States."[1] Furthermore, Austin's notion of law as a command emanating from a

[1] Compare Dewey, "Austin's Theory of Sovereignty," "Political Science Quarterly," vol. IX; Maine, "Early History of Institutions," lect. XIII. But apparently Austin was thinking only of legal sovereignty, which must from the nature of the case be located in a determinate authority, and not of political sovereignty, which may abide in an indeterminate number of persons.

determinate superior — a conception which lies at the basis of his theory of sovereignty — has been criticised by the historical jurists on the ground that it ignores the great body of customary law which has grown up through usage and interpretation, and which never had its source in the will of a determinate superior; that it errs in treating all law as being merely command; and that it exaggerates the single element of force to the neglect of obvious historical facts with which Austin could not have been unacquainted.[1]

Austin apparently foresaw the objections that would be urged against his definition of law, and he sought to anticipate them by one of those legal fictions common among lawyers, namely, by extending the scope of his definition to include customary law. Custom, he argued, is law only when sanctioned by the sovereign, and what the sovereign permits he commands; hence, customary law is a legal command, and he who permits it to continue as law is the sovereign. But, like most legal fictions, this is rather unsatisfactory, if indeed it does not prove too much for his doctrine.[2]

Another objection sometimes urged against the Austinian theory is the absolutism which it attributes to sovereignty. Like Hobbes, Austin held that the fountain and source

[1] See on this point Maine, "Early History of Institutions," p. 352; Clark, "Practical Jurisprudence: a Commentary on Austin," pp. 166 ff.; Sidgwick, "Elements of Politics," Appendix A; Markby, "Elements of Law," p. 24; Lowell, "Essays on Government," ch. 5 (chapter on "Sovereignty"); Wilson, "An Old Master and Other Essays," ch. 5; Ritchie, in the "Annals of the American Academy of Political and Social Science," vol I, p. 387; T. H. Green, "Political Obligation," pp. 93–120; Lightwood, "Nature of Positive Law," ch. 13; Merriam, "History of Sovereignty," pp. 145 ff.

[2] Thus, says Dewey (*op. cit.*, p. 50), if the doctrine be true that what the sovereign does not forbid he enjoins, the whole social activity of mankind would have to be conceived of as carried on in obedience to the commands of a determinate authority, which manifestly would lead to a *reductio ad absurdum*. Compare also Ritchie, (*op. cit.*, p. 388), who says, "to call a custom a command of parliament because permitted, is the same as saying that the refusal of the king of Persia to forbid the observance of the Sabbath is the equivalent of commanding the observance of it."

of law could not be limited by any higher law, and hence sovereignty involved legal despotism. There cannot, he said, be a hierarchy of supremacies nor a coördination of creators nor a series of sovereigns ascending to infinity. He frankly admitted that there was no escape from the conclusion that sovereignty is legally unrestrainable, and hence the sovereign is, legally speaking, a despot, however benevolent he may be in fact. But he pointed out, what is obviously true, that it does not follow that because the sovereign is unlimited in its powers the government through which it expresses itself is necessarily subject to no restriction.

Of the merits of Austin's theory we venture the opinion that his chief error consisted in unduly emphasizing the purely legal aspects of sovereignty, and in overlooking the forces and influences which lie back of the formal law — a very natural mistake for a lawyer to make. It may also be said that his theory was probably inapplicable to all states of society, such, for example, as Maine described in his work on the "Early History of Institutions."[1] But as a conception of the strict legal nature of sovereignty, Austin's theory is, on the whole, clear and logical, and much of the criticism directed against it has been founded on misapprehension and misconception.[2]

The nature of sovereignty has not always been understood, nor is it now. It has often been the subject of much loose thinking by statesmen and of dogmatism by political writers.[3] Powerful constitutional controversies concerning its location have shaken more than one state in the past and have sometimes even led to civil commotion. While there is now a

[1] See especially ch. 13.

[2] For a discussion and criticism of Austin's views see Jethro Brown, "The Austinian Theory of Law," especially chs. 3 and 5.

[3] Compare on this point Jellinek, "Staatenverbindungen," p. 7. "No word," says Lieber, "has claimed more consideration within the last century and a half, yet its meaning has all the time been changing and has hardly ever been used with any definiteness."

substantial consensus of opinion among the best political writers concerning its fundamental characteristics, there are still differences of opinion regarding its place of abode in some of the complex states of the present day.[1]

[1] For a discussion of the theories concerning the location of sovereignty see Bliss, "On Sovereignty," ch. 6. It would be difficult, for example, to say where sovereignty resides in the United States, whether in the people of the country at large or whether in the people of three fourths of the states, or either. The constitution, as a matter of fact, may be amended and ratified according to two different processes. So far, all amendments have been proposed by Congress and ratified by the state legislatures, so that neither the people of the United States, nor the people of the states, have, in fact, participated in the exercise of the sovereign power.

CHAPTER IX

THEORIES OF STATE FUNCTIONS

Suggested Readings: ADAMS, "Relation of the State to Industrial Action"; AMOS, "Science of Politics," ch. 10; BEUDANT, "Le Droit individuel et l'État," chs. 1, 4; BLUNTSCHLI, "Allgemeine Staatslehre," bk. V, chs. 1–4; also his "Allgemeines Staatsrecht," bk. VI, ch. 1; BORNHAK, "Allegemeine Staatslehre," pt. I, sec. III; BURGESS, "Political Science and Constitutional Law," vol. I, bk. II, ch. 4; CUNNINGHAM, "Economics and Politics," ch. 4; DONISTHORPE, "Individualism," chs. 3, 9, 10; DUPONT-WHITE, L'Individuel et l'État"; FLINT, "Socialism," chs. 1–3; GRAHAM, "Socialism," chs. 5–9; GREEN, "Political Obligations," pp. 142–243; HADLEY, "Economics," ch. 1; HELD, "System des Verfassungsrechts," ch. 10; HOLTZENDORFF, "Principien der Politik," bk. III, chs. 7–11; HUMBOLDT, "Sphere and Duties of the State" (trans. by Coulthard); HUXLEY, "Administrative Nihilism," in his "Critiques and Addresses," ch. 1; JELLINEK, "Recht des modernen Staates," bk. II, ch. 8; JOURDAN, "Rôle de l'État dans l'Ordre économique," Introduction; KIRKUP, "History of Socialism," Introduction and chs. 9–11; LACY, "Liberty and Law," chs. 4, 5, 6, 8; LAVELEYE, "Le Gouvernement dans la Démocratie," vol. I, bk. I, chs. 7, 8, 10, 11, 12; LABOULAYE, "The Modern State," ch. 1; LEROY-BEAULIEU, "L'État moderne et ses Limites," chs. 1, 2, 5; LIEBER, "Political Ethics," vol. I, bk. II, ch. 5; LILLY, "First Principles of Politics," chs. 3, 4; MACKAY, "A Plea for Liberty," chs. 1, 2, 4; MCKECHNIE, "The State and the Individual," chs. 3, 4, 8, 12, 13; MICHEL, "L'Idée de l'État," Introduction, also bk. III; MILL, "Political Economy," vol. II, bk. V, chs. 1, 8, 9; also his "Essay on Liberty"; MONTAGUE, "Limits of Individual Liberty," ch. 6; POLLOCK, "History of the Science of Politics," ch. 4; POSADO, "Tratado de Derecho Politico," bk. V, chs. 1–3; also bk. VI; RAE, "Contemporary Socialism," ch. 11; RITCHIE, "Principles of State Interference," chs. 2, 3; BRUCE SMITH, "Liberty and Liberalism," chs. 9 and 10; SPENCER, essays on the "Duty of the State," "Limits of State Duty," "Poor Laws," "Education," "Sanitary Supervision," "Currency," "The Coming Slavery," "Sins of Legislators," and "The Great Political Superstition," collected and published under the title "Social Statics and Man *versus* the State"; VILLEY, "Rôle de l'État dans l'Ordre économique," Introduction; WOOLSEY, "Political Science," vol. I, pt. II, chs. 4 and 5; ZACHARIA, "Vierzig Bücher vom Staate," bk. V.

I. THE INDIVIDUALISTIC OR LAISSEZ-FAIRE THEORY

THE doctrines concerning the sphere of the state, if we exclude those of the anarchists, who profess to believe that the state should be done away with entirely, may be roughly grouped into three classes, which we may designate as the individualistic theory, the socialistic theory, and the compromise theory.

The View that the State is a Necessary Evil

The individualist, unlike the anarchist, considers the state to be a necessity, though he is pretty nearly at one with the anarchist in regarding it as essentially an evil, and hence its sphere of activity should be restricted to the narrowest possible limits, consistent with the maintenance of peace, order, and security. The individualistic doctrine regards all restraint *qua* restraint as an evil and every extension of the power of the state as so much taken from the domain of individual liberty. It holds that the state is a necessity simply because of the inherent egoism and ignorance of man, which lead him to disregard the rights of his fellow men for his own selfish purposes. A noted Frenchman, Jules Simon, expressed the individualistic idea in extreme form when he said the state ought to strive to make itself useless and prepare for its own demise.[1] The same idea was expressed by the historian Freeman, in language which has a decided anarchistic ring, when he remarked that "the ideal form of government is no government at all; the existence of government in any shape is a sign of man's imperfection."[2]

Function only to Restrain

The state exists, argue the individualists, merely because crime exists, and its principal function, therefore, is to restrain, not to direct and promote.[3] When the state

[1] Quoted by Laveleye in his "Le Gouvernement dans la Démocratie," vol. I, p. 24.

[2] Essays, p. 353.

[3] "*Imaginez en effet une politique parfaite,*" says Janet, "*un gouvernement parfait, des lois parfaits, vous supposez par la-même des hommes parfaits. Mais alors la politique ne serait plus autre chose que le gouvernement libre de chaque homme par soi-même; en d'autres terms, elle cesserait d'être. Et cependant, c'est là sa fin et son ideal. L'objet du gouvernement est de preparer insensiblement les*

undertakes to own and operate agencies for transporting freight and passengers; when it undertakes to carry parcels for private individuals; send telegrams; subsidize theaters and give concerts; maintain libraries, museums, art galleries, hospitals, zoölogical gardens, parks, playgrounds, bath and wash houses; erect dwellings for the poor; provide schools and colleges for the education of the young; and send out scientific expeditions,—it not only undertakes to do what is not necessary for the protection of the individual, which is the only excuse for the existence of government, but it is encroaching upon the domain of private enterprise or otherwise interfering with the liberty of the individual. The individualists therefore condemn public education; sanitary, vaccination, and quarantine laws; laws regulating the conduct of trade and industry; pure food laws; and indeed all legislation the effect of which is to impose restrictions upon industry or business or to interfere with the social habits of individuals. In short, its sole function in regard to industry is to leave it alone.[1] The modern state attempts to do entirely too many things, say the individualists. "*Ne pas trop gouverner;*" "*laissez faire, laissez passer,*" expresses their conception of its legitimate duty. It should be nothing more than a police organization to enforce contracts, keep the peace, and punish crime; and when this is done, its functions are exhausted.[2]

hommes à cet état parfait de société, où les lois et le gouvernement lui-même deviendraient inutiles." "Histoire de la Science politique," vol. I, p. c.

[1] Donisthorpe, "Individualism," p. 38; Michel, "L'Idée de l'État," p. 630. "It cannot be too carefully remembered," declares Bruce Smith ("Liberty and Liberalism," p. 252), an ardent individualist, 'that almost every clause of an act of parliament, if it has force and effect at all, takes away liberty from somebody because it must of necessity speak of something which shall or shall not be done where before it was optional."

[2] "Individualists," said the late Professor Huxley, in his essay on "Administrative Nihilism," "condemn all sanitary legislation, all attempts on the part of the state to prevent adulteration, or to regulate injurious trades; all legislative interference with anything that bears directly or indirectly on commerce, such as shipping harbors,

Origin and Development of the Laissez-faire School of Thought

Individualism as a political doctrine had its origin in the latter part of the eighteenth century as a reaction against the evils of overgovernment in Europe. It was one of the leading tenets of the physiocratic school of economists that the state ought not to interfere with the economic activities of the people by prescribing conditions under which industry should be carried on, but should confine its functions to the simple protection of the laws of nature under which production would best regulate itself if left alone.[1] They accordingly attacked the prevailing notions regarding the omnipotence of the state and demanded freedom of trade and industry. This doctrine received a powerful stimulus from the publication of Adam Smith's "Wealth of Nations" (1776), which was largely a plea for the policy of non-interference by the state in economic matters. Smith denounced the laws then in

railways, roads, cab fares, and the carriage of letters; and all attempts to promote the spread of knowledge by the establishment of teaching bodies, examining bodies, libraries, or museums; all endeavors to advance art by the establishment of schools of design, or picture galleries, or by spending money upon an architectural public building when a brick box would answer the purpose. According to their views, not a shilling of public money must be bestowed upon a public park or pleasure ground; not a sixpence upon the relief of starvation, or the care of disease. Those who hold these views support them by two lines of argument. They enforce them deductively by arguing from an assumed axiom, that the state has no right to do anything but protect its subjects from aggression. The state is simply a policeman, and its duty is neither more nor less than to prevent robbery and murder and enforce contracts."

Professor Sidgwick thus states the functions of government according to the individualistic doctrines: 1. "To protect the interests of the community generally and individual citizens so far as may be necessary from the attacks of foreign states. 2. To guard individual citizens from physical injury, constraint, insult, or damage to reputation, caused by the intentional or culpable careless action of other individuals. 3. To guard their property from detriment similarly caused; which involves the function of determining doubtful points as to the extent and content of the right of property and the modes of legally acquiring it. 4. To prevent deception leading to the detriment of person or property. 5. To enforce contracts made by adults in full possession of their reasoning faculties, and not obtained by coercion or misrepresentation nor injurious to other persons. 6. To protect in a special degree persons unfit, through age or mental disorder, to take care of their own interests." "Political Economy," p. 420.

[1] Compare Sidgwick, "Political Economy," p. 399.

force restricting the free interchange of the products of labor and interfering with the free employment of labor, as mischievous and destructive of their own purpose. Later the doctrine of natural liberty in economic matters was defended by various other English economists, notably Cairnes, Ricardo, and Malthus; by French writers like Bastiat, De Tocqueville, Dunnoyer, Leon Say, and M. Taine; and by the German philosophers Kant, Fichte, Wilhelm Humboldt, and the Baron Eötvos. Still more recently the individualistic doctrines have found earnest advocates in Laboulaye, Michel, and Leroy-Beaulieu in France, and in Herbert Spencer, John Stuart Mill, Earl Wemyss, the Duke of Argyle, Bruce Smith, Wordsworth Donisthorpe, and others in England.[1]

Wilhelm Humboldt's Argument

One of the earliest and ablest arguments in favor of the "governmental minimum" was written by a Prussian, Wilhelm Humboldt, in 1791, but for political reasons it was not published until 1852, after the author's death. It was entitled "Ideen zu einem Versuch, die Grenzen der Wirksamkeit eines Staates zu bestimmen."[2] Humboldt laid down the proposition that the state should "abstain from all solicitude for the positive welfare of the citizens and ought not to proceed a step farther than is necessary for their mutual security and protection against foreign enemies." For these purposes only should it impose re-

[1] The laissez-faire theories have been vigorously exploited and popularized in England by the "Liberty and Property Defense League," an organization formed some years ago for the purpose of "resisting overlegislation and for maintaining individualism as opposed to socialism." It has printed and distributed thousands of pamphlets, leaflets, and some books, dealing with the growing tendency to substitute government regulation in the place of individual management and enterprise in all branches of industry and attempting to show the paralyzing effect of this kind of legislation upon the national development. Its membership has numbered many thousands, including such men as Lord Justice Bramwell, the Earl of Wemyss, Lord Penzance, and the Earl of Pembroke. It scrutinizes all projects of legislation and endeavors to prevent the enactment of laws contrary to the principles for which the league stands.

[2] This essay has been translated into English under the title "Sphere and Duties of the State," by Joseph Coulthard (London, 1854).

strictions upon individual liberty.[1] "The grand point to be kept in view by the state," he said, "is the development of the powers of all its single citizens in their perfect individuality; it must, therefore, pursue no other object than that which they cannot procure for themselves, viz. security; and this is the only true and infallible means to connect, by a strong and enduring bond, things which at first sight appear to be contradictory — the aim of the state as a whole and the collective aims of all its individual citizens." [2]

Spencer's Defense of the Laissez-faire Theories

The most elaborate defense of the individualistic view of the sphere of the state has been made by Herbert Spencer in a series of essays published under the collective title "Social Statics and Man *versus* the State," a work which has done more to elucidate and popularize the laissez-faire doctrine than any other political treatise. Spencer starts out with the assertion that the existence of the state is the result of man's inherent perversity and egoism and that in reality it is an aggressor rather than a protector. "Be it or be it not true," he says, "that man is shapen in iniquity and conceived in sin, it is unquestionably true that government is begotten of aggression and by aggression." [3] Being instituted merely for the purpose of curbing his wicked propensities and protecting him from the violence and fraud of his fellows, it follows that in a morally perfect condition of society government can have no *raison d'être*. "Have we not shown," he asks, "that government is essentially immoral? . . . Does it not exist because crime exists, and must government not cease when crime ceases, for very lack of objects on which to perform its functions?" He goes on to

[1] Ch. III.

[2] *Ibid.*, p. 184. It is interesting to note in view of Humboldt's ideas concerning state aid to education that in later life he was minister of public instruction in Prussia and was the founder of the University of Berlin, an institution supported and maintained by the state.

[3] "Social Statics and Man *v.* the State" (1903), p. 334.

say that "it is a mistake to consider that government must last forever. . . . It is not essential, but incidental. As amongst Bushmen we find a state antecedent to government, so may there be one in which it shall have become extinct." The doctrine that the state is justified in doing whatever seems to those in authority to be "expedient," or whatever tends to produce the "greatest happiness," or which will subserve the "general good," Spencer denounces as governmental despotism, since there is no standard or test for determining what is expedient or what is for the general good except the opinions of the governors themselves.

The Militant *versus* the Industrial Type of Society

He dwells upon what he calls the *militant* type of society, with its excessive regimentation and its army-like organization; he compares this with the *industrial* type, contrasts the condition of the individual under the régime of status with his condition under a régime of contract, as he calls it, and emphasizes the advantages of voluntary over compulsory coöperation and of negative *versus* positive regulation. The experience of the past, he affirms, proves that the acquisition of happiness does not come through state action, but through being left alone. Cutting away men's opportunities on one side in order to add to them on another is nearly always accompanied by loss, he says, through the friction of administrative mechanism. The sphere of government should be "negatively regulative," that is, its functions should be to redress evils, not to try to make men happier by helping them to do what they can do as well or better themselves. "To administer justice, to mount guard over men's rights," are the only proper functions of the state; and when it does more, it defeats its own ends. The duty of the state is to formulate in law preëstablished rights, not to create them, and to enforce them instead of intruding on them like an aggressor.[1] The individual has but one right, the right

[1] *Ibid.*, p. 406.

of equal freedom with everybody else, and the state but one duty, the duty of protecting that right against violence and fraud.

State Activities condemned by Spencer

Spencer inveighed against all legislation for the regulation of commerce and trade; against sanitary legislation, such as quarantine, vaccination, and registration laws; against public education; against poor relief by the state; and even against state-managed post offices and currency issued by the state. Every attempt to mitigate the suffering of the poor through state intervention, he declared, "eventuates in the exacerbation of it." The sums devoted to the support of paupers should go to support laborers in new reproductive works.[1] In regard to education by the state, he observes that "taking away a man's property to educate his own or other people's children is not needful for the maintenance of his rights and hence is wrong."[2] State intervention is legitimate only for the protection of violated rights, and the rights of children are not violated by neglect of their education. The idea that it is the duty of the state to undertake to protect the health of the people Spencer combats with equal ardor, though he admits that the state may suppress nuisances.[3] All taxation for sanitary superintendence must, he says, be condemned. He goes to the length even of maintaining that it is a "violation of the moral law" for the state to "interpose between quacks and those who patronize them," or to forbid unlicensed persons from prescribing for the sick, since it is the inalienable right of the individual to "buy medicine and advice from whomsoever he pleases," and the unlicensed practitioner should have the same right to sell to whomsoever he will. Regarding the right of the state to monopolize the issue of money, he maintains that it cannot justly forbid the issue of or enforce the acceptance of certain notes or coin in return for other things, since that would be an infringement of the natural right

[1] "Social Statics," p. 132. [2] *Ibid.*, p. 156. [3] *Ibid.*, p. 200.

of exchange and a violation of the law of equal freedom.[1] Finally, Spencer condemns the construction of public works by the state except such as may be necessary for the national defense and rejects its right to a monopoly of the postal service, since "it is clear that the restriction thus put upon the liberty of trade by forbidding private letter-carrying establishments is a breach of state duty."[2]

Basis of Spencer's Argument

Much of Spencer's case against the state is based upon the errors and blunders of particular governments in the past. The statute books, he laments, are a record of "unhappy guesses." "Nearly every parliamentary proceeding is a tacit confession of impotence, for the great majority of legislative measures introduced are designed to amend and improve existing laws." In an essay entitled "The Sins of Legislators," Spencer reviews much of the unwise legislation of the past, dwells upon the evils which resulted from it, and concludes that because much of this legislation was in time repealed or modified it ought never to have been enacted. He protests against what he calls the worship of the legislature and asserts that as the great political superstition of the past was the divine right of kings, that of the present is the divine right of parliaments. And the divine right of parliaments means only the divine right of the majority, for the minority has no right to be respected.[3] Some men actually seem to think, he remarks, that individuals can be made moral by an act of the legislature and that which is economically unsound can be made sound and wise by the fiat of the state.

Some of Spencer's followers, like Donisthorpe and Auberon Herbert, go to even greater lengths in their opposition to state regulation. They not only oppose education by the state; poor relief; inspection of factories, mines, and workshops; the regulation of injurious trades; compulsory vaccination laws; quarantine and health regulations; the requirement of official oaths; Sunday legis-

[1] *Ibid.*, pp. 221–226. [2] *Ibid.*, p. 231. [3] *Ibid.*, p. 381.

lation; laws regulating public amusements; restrictions upon the sale of liquor, etc., — but they even deny to the state the right to regulate the marriage relation or restrict in any manner individual liberty in social matters except in so far as it is absolutely necessary to protect each man from the positive aggressions of his fellows.[1]

II. DEFENSE OF THE LAISSEZ-FAIRE THEORY

The Grounds of Justice

In defense of the individualistic conception of the sphere of state activity it is argued, in the first place, that considerations of justice require that the individual shall be let alone by the state in order that he may realize fully and completely the ends of his existence. This particular line of argument has had the powerful support of such scholars as Kant, Fichte, Humboldt, and John Stuart Mill. According to their views it is necessary to the harmonious development of all the powers of the individual that he should be interfered with as little as possible by the state, because every restriction upon his freedom of action tends to destroy his sense of initiative and self-reliance, weaken his responsibility as a free agent, impair his energies, and blunt his character.

Freedom Essential to the Harmonious Development of the Individual

"The true end of man, or that which is prescribed by the immutable dictates of reason," observed Humboldt, "is the highest and most harmonious development of his powers to a complete and consistent whole." Overgovernment Humboldt goes on to say, not only diminishes freedom, but "superinduces national uniformity and a constrained and unnatural manner of action" by its tendency to reduce society to a dead level.[2] The same line of argument is pursued by Mill, who asserts that an excess of government, especially of the meddling and inquisitorial sort, "starves the development of some

[1] Compare especially Donisthorpe, "Individualism," chs. 6 and 7.

[2] "Ideen," etc., chs. 1 and 2.

portion of the bodily or mental faculties, when it deprives one from doing what one is inclined to do or from acting according to one's judgment of what is desirable."[1] Free competition develops in the individual the highest possibilities, sharpens and strengthens his powers of initiative, and increases his sense of self-reliance; while overgovernment not only hampers enterprise and interferes with the natural development of trade, but it strikes at the development of character, tends to crush out individuality and originality by interfering with the natural struggle between individuals, and leads to a general lowering of the social level.[2] The highest civilization, say the laissez-faire advocates, has been developed under individualism, a system which has produced more material and educational progress than could ever have been produced under paternalism. Spencer dwells upon the fact that in an overgoverned state "everybody is like everybody else." Government management and control of industry, he complains, is "essentially despotic"; it "unavoidably cramps" by diminishing liberty of action, "angers," leads to discontent, "galls by its inefficiency, and restrictions," offends by professing to help those whom it will not allow to help themselves and vexes by the swarm of dictatorial officials who are forever stepping in between men and their pursuits.[3] The "evils of officialism" and of "socialistic meddlings," he declares, prevent the healthy and natural development of a people, while freedom develops and

Overgovernment weakens Individual Character

[1] "Political Economy" (ed. of 1864), vol. II, p. 561; cf. also Kant in his "Principles of Politics" (trans. by Hastie, p. 36). "Individualism," says Michel, in his "L'Idée de l'État" (p. 372), "stands for the emancipation of the man, the complete development of all his powers, and the full enjoyment of all his rights as an individual." Again he says, "Individualism is alone capable of furnishing a rational foundation for the philosophy of right as well as political liberty and the sovereignty of the people." *Ibid.*, p. 630.

[2] Compare Bruce-Smith, "Liberty and Liberalism," p. 320; and Argyle, "Reign of Law," p. 340.

[3] "Social Statics," p. 135.

strengthens individual character and conduces to human progress. "A people among whom there is no habit of spontaneous action for a collective interest," said Mill "who look habitually to their government to command and prompt them in matters of joint concern — who expect to have everything done for them except what can be made an affair of mere habit and routine — have their faculties only half developed; their education is defective in one of its most important branches." [1]

Individualism rests on Scientific Grounds

The laissez-faire principle, say its advocates, rests also upon sound considerations of a scientific character. It is in harmony with the principle of evolution, since it is the only system that will lead to the survival of the fittest in the economic struggle. It assumes that self-interest is a universal principle in human nature, that each individual is a better judge of what his own interests are than any government can possibly be, and that if left alone he will follow them.[2] It holds that each individual should be allowed to stand alone or fall according to his worth, unaided by the props and supports of the state, and should be left to work out his own destiny without the guidance and tutelage of government. By leaving each individual to do unaided that for which he is best fitted, the strong and fit classes survive, the unfit elements are eliminated, and thus the good of society is promoted.[3]

Individualism rests on Sound Economic Principles

Again, and this is most important in the arguments of the laissez-faire theorists, the policy of non-interference rests upon sound economic principles. Better economic

[1] "Political Economy," vol. II, p. 567.

[2] *Ibid.*, p. 569. Cf. Willoughby, "The Nature of the State," p. 326; and Jourdan, "Rôle de l'État dans l'Ordre économique," p. 37. "Laissez faire," says Cairnes, "assumes that the interests of human beings are fundamentally the same; that that which is best for the interests of one is the best for others; that the individual knows his interests in the sense in which they are coincident with the interests of others and that in the absence of coercion he will in this sense follow them." "Essays on Political Economy," p. 244.

[3] Compare Smith, "Liberty and Liberalism," p. 429.

results, it is asserted, are obtained for society by leaving the conduct of industry as far as possible to private enterprise. Adam Smith, in his "Wealth of Nations," pointed out that the system of natural liberty tends toward the largest production of wealth. The self-interest of the consumer will lead to the demand for the things that are most useful to society, while the self-interest of the producer will lead to their production at the least cost.[1] In the economic struggle the individual is animated mainly by motives of self-interest. If, therefore, he is allowed to use his capital as he pleases, to dispose of his labor to the best advantage, to exchange the products of his toil freely, and to have prices fixed by the natural laws of supply and demand, better results, not only to himself, but to the whole society, will be secured. Unrestricted competition stimulates economic production, tends to keep wages and prices at a normal level, to prevent usurious rates of interest, to secure efficient service and the production of better products than can be obtained by state regulation or state management.

The Policy of Excessive State Regulation condemned by Experience

The experience of the past, say the laissez-faire advocates, abundantly establishes the wisdom of the non-interference principle. History is full of examples of attempts to fix by fiat of the state the prices of food and clothing and of many other commodities; of laws regulating the wages of labor, prohibiting the wearing of certain kinds of apparel and requiring the wearing of certain other kinds, forbidding the exportation of divers commodities, forbidding certain kinds of machinery in manufacturing processes, restricting the manufacture of certain articles to apprentices, prescribing the location of factories; laws aiding and encouraging certain industries by means of bounties and discouraging certain others by prohibitive taxes; laws prohibiting combinations among laboring men, fixing the hours of labor, restricting certain trades

[1] Compare Sidgwick, "Political Economy," p. 401.

exclusively to members of guilds; and even laws prescribing the cut of one's dress, the number of meals which one should eat, the sizes of buttonholes, the length of shoes, the making of pins, and the kind of material in which the dead should be buried. As late as 1795 magistrates in England had the power of fixing the rate of wages according to the price of bread, and it was not until the same year that a workman could travel out of his parish in search of work. Until 1824 there was in force an act of Parliament which forbade manufacturers from locating their factories more than ten miles from the royal exchange. Throughout the seventeenth and eighteenth centuries the state everywhere exercised a strict and at times arbitrary control over many forms of industry. It determined who could work and where, the materials with which they should work, and the conditions generally under which various trades should be carried on. Legions of inspectors, measurers, and commissioners saw that the conditions prescribed by the state were observed.[1] Regulations prescribing the quality and dimensions of manufactured articles were defended on the ground that consumers were not competent judges of their own needs. Industry was deprived of its natural freedom by laws forbidding skilled labor except by apprentices or by monopolies which limited the right to engage in certain trades to those who had exclusive privileges. Most of such legislation was mischievous and destructive of the ends which it was intended to secure, and the results which were sought for could have been more effectively obtained by allowing every man to sell his labor and goods whenever and wherever he wished.[2] Speaking of those who were responsible for this sort of legislation, Buckle observed that "they went blundering along in the old track, believ-

Meddlesome Legislation

[1] Cf. Mill, "Political Economy," vol. II, pp. 532 ff.

[2] Cf. Smith, "Liberty and Liberalism," p. 247. For a review of such legislation see Hume, "History of England," vol. II, ch. 16, and Smith, *op. cit.*, ch. 6.

ing that no commerce could flourish without their interference, hampering that commerce by repeated and harassing regulations, and taking for granted that it was the duty of every government to benefit the trade of its own people by injuring the trade of others." [1] The extent to which the governing classes have interfered and the mischief which that interference has produced are so remarkable, he concludes, as to make thoughtful men wonder how civilization could have advanced in the face of such repeated obstacles.

The State not Omniscient or Infallible

Finally, the laissez-faire theorists argue that it is a false assumption which attributes omniscience and infallibility to the state and which regards it as better fitted to judge of the needs of the individual, and to provide for them than he is himself. There is, they assert, a common belief that governments are capable of doing anything and everything, and of doing it more efficiently than it can be done by private initiative, when, in reality, experience and reason show the contrary to be the fact. The state has no greater powers of invention or of initiative than the individuals who compose it; it is not a creative organ, but an "organ which acts only by means of a complicated apparatus, composed of numerous wheels and systems of wheels subordinated one to another"; it is an organ of criticism, of generalization, and of coördination, from which it follows that the state cannot be the first agent, the primary cause of progress in human society, but only an auxiliary or agent of propagation.[2] Every additional function, observes Mill, means a new burden imposed on a body already overcharged with duties; the result is that most things are ill done; and much is not done at all, because the government is not able to do it without delays. The great majority of things are worse done, he declares, when done by government than when done by individuals

[1] "History of Civilization," vol. I, p. 313.

[2] Leroy-Beaulieu, "The Modern State," bk. I, ch. 5.

who are most interested, for the people understand their own business better and care for it better than any government can; all the faculties which a government enjoys of access to information, all the means which it possesses of remunerating and therefore of commanding the best available talent in the market, are not an equal for the one great disadvantage of an inferior interest.[1]

[1] "Political Economy," vol. II, p. 565. While the state possesses certain natural characteristics which give it a decided advantage as an industrial manager, it has, says Rae, in his work on "Contemporary Socialism" (p. 409) "one great natural defect, its want of a personal stake in the produce of the business it conducts, its want of that keen check on waste and that pushing incentive to exertion which private individuals enjoy in the eye and energy of the master. This is the great taproot from which all the usual faults of government management spring — its routine, red-tape spirit, its sluggishness in noting changes in the public taste, and in introducing improved methods of production. Government servants may very generally be men of a higher stamp and training than the servants of a private company, but they are proverbial, on the one hand, for a certain lofty disdain of the humble but valuable virtue of parsimony, and, on the other, for an unprogressive, unenterprising, uninventive administration of business."

The objections to the extension of governmental functions beyond what is required to satisfy the individualistic standard are well summarized by Lecky, in his "Democracy and Liberty" (vol. I, p. 276), as follows: "There is, in the first place, what may be called the argument of momentum, which Herbert Spencer has elaborated with consummate skill and force. It is absolutely certain that, when this system is largely adopted, it will not remain within the limits which those who adopted it intended. It will advance with an accelerated rapidity; every concession becomes a precedent or basis for another step, till the habit is fully formed of looking on all occasions for state assistance or restriction, and till a weight of taxation and debt has been accumulated from which the first advocates of the movement would have shrunk with horror. There is the weakening of private enterprise and philanthropy; a lowered sense of individual responsibility; a diminished love of freedom; the creation of an increasing army of officials, regulating in all its departments the affairs of life; the formation of a state of society in which vast multitudes depend for their subsistence on the bounty of the state. All this cannot take place without impairing the springs of self-reliance, independence, and resolution, without gradually enfeebling both the judgment and the character. It produces also a weight of taxation which, as the past experience of the world abundantly shows, may easily reach a point that means national ruin. An undue portion of the means of the individual is forcibly taken from him by the state, and much of it is taken from the most industrious and saving, for the benefit of those who have been idle or improvident. Capital and industry leave a country where they are extravagantly burdened and have ceased to be profitable, and even the land itself has been thrown out of cultivation on account of the weight of an excessive taxation."

III. CRITICISM OF THE LAISSEZ-FAIRE DOCTRINE

The State is not an Evil

The individualistic theory of state functions has been criticised upon various grounds. First of all, the assumption that the state is an evil has not been borne out by the experience of mankind under the régime of state organization. History, in fact, shows unmistakably that the progress of civilization in the past has been promoted to a very large degree by wisely directed state action, in short, that the state is a positive good. It is true, of course, that at times the ends of the state have been perverted to the detriment of the public good, but this is no more reason for condemning it as an evil than for saying that railroads are an evil because their operation sometimes results in accidents. Spencer's doctrine that the state exists only because crime exists and that it would subserve no purpose in a society of morally perfect beings cannot be accepted. The function of the state in the complex civilization of to-day is not merely repressive, not simply "negatively regulative"; it has a higher mission than that of restraint and punishment.

Function of the State not merely that of Restraint

So long as men live in groups they will have collective wants which can only be satisfied through state organization, and hence there is no reason for believing that the necessity for the state will ever disappear or that the rôle which it now plays in the life of human societies will ever diminish. On the contrary, all the signs indicate that with the increasing complexity of modern civilization the need for state action will become stronger and its rôle more extensive. In comparatively recent years a strong reaction against the individualistic movement of the earlier nineteenth century has everywhere taken place, due largely to the conditions resulting from the growth of manufactures, the congestion of the population in the cities, the growth of corporate wealth, and changed economic and social conditions generally, all of which have

Reaction against the Doctrine of Laissez-Faire

thrown the laissez-faire theories into disrepute. "The higher the state of civilization," observes Huxley, "the more completely do the actions of one member of the social body influence all the rest, and the less possible is it for any one man to do a wrong without interfering more or less with the freedom of all his fellow-citizens. So that even upon the narrowest view of the functions of the state it must be admitted to have wider powers than the advocates of the police theory are disposed to admit." [1] Laveleye points out in the same manner that as civilization progresses men become more dependent on one another and upon society as a whole, and hence the rôle of the state must increase correspondingly in order to satisfy their common wants. The individualism of Spencer, as Laveleye rightly concludes, is wholly inadmissible under the conditions of modern society.[2]

Mistaken Views of the Individualists

The view of the laissez-faire advocates that state intervention in the interest of the common good necessarily involves a curtailment of individual freedom rests on an assumption that is true only within very restricted limits. It is a very narrow view indeed which sees in a factory act, a pure food law, or a quarantine regulation nothing but an infringement upon the domain of individual liberty." [3] The rights of all are enlarged and secured by wise restric-

[1] "Critiques and Addresses," p. 11. Compare also Mill, himself an individualist in most matters, who remarks that the restriction of government to the mere protection of person and property against force and fraud is a rule which cannot be strictly adhered to, for it "excludes some of the most undisputed and recognized functions of government." "Political Economy," vol. II, p. 387.

[2] "Le Gouvernement dans la Démocratie," vol. I, p. 38. See also an article by Laveleye in the "Contemporary Review" for April, 1885, in which the individualistic views of Spencer are criticised.

[3] Nevertheless, this is the attitude of the laissez-faire theorists. Bruce Smith, for example, in his "Liberty and Liberalism," pp. 536–540, argues that a factory act is a "distinct instance of interference with property." "Every act of parliament," he says, "which in any way curtails the hours of labor or limits the number of workmen involves an interference with the freedom of industry and renders less valuable the property invested in the business upon which the restrictions are imposed."

tions upon the actions of each. It is somewhat like pruning a fruit tree or trimming a vineyard; it means a loss of some fruit, but better fruit is produced so that all are gainers in the end.

The State is not Hostile to Liberty

The weakest point in the argument of the laissez-faire advocates is the assumption that the state is necessarily hostile to freedom, that government and liberty represent antithetical ideas, that in proportion as the functions of government are multiplied the domain of individual liberty is restricted, — in short, that a maximum of government means a minimum of freedom. In reality wisely organized and directed state action not only enlarges the moral, physical, and intellectual capacities of individuals, but increases their liberty of action by removing obstacles placed in their way by the strong and self-seeking, and thus frees them from the necessity of a perpetual struggle with those who would take advantage of their weakness. In this way the latent abilities of the individual are liberated, and his opportunities increased.[1] It is manifestly wrong to assume that all restraint is an evil. In truth the state emancipates and promotes as well as restrains. The doctrine that governmental regulation tends to impair individual character by weakening the sense of individual initiative, self-reliance, and self-help, and by preventing the full and harmonious development of the faculties of the individual, has been greatly exaggerated by the laissez-faire advocates. Many of the individualistic writers like Mill, Humboldt, and Spencer have, in fact, confused individuality with eccentricity and oddity of character, qualities which in themselves have nothing of value. Character is developed not through freedom alone, but quite as much through discipline and restraint. It is not true that as the functions of government are extended the individual becomes weaker and less self-reliant. The

Not all Restraint is an Evil

[1] Compare Ritchie, "Principles of State Interference," p. 50; and Funck-Brentano, "La Politique," p. 34.

most perfectly developed man is the social, not the natural man, for it is now generally admitted that the individual owes much of his character to the society of which he is a part.

Individualistic Exaggerations

The chief fault of the individualists is that they exaggerate the evils of state regulation and minimize the advantages; they misunderstand the true nature and limits of liberty and have a mistaken idea of the relation of the individual to the society of which he is a part. In short, they overemphasize the importance of the man at the expense of the group; they treat him as if he were paramount and as if he determined the character of society when in fact it is society, as has been said, that determines in a large degree the character of the individual. Their doctrine rests on the assumption that the individual is largely a thing apart from the group of which he is a member, that he can be separated from society and treated as though his interests were entirely distinct from the interests of his fellow men. In reality, however, the individual is more than a mere fraction of society; he is the epitome of it; he is the "concise formula for the total of actions and attributes; . . . out of relation to other things, he is literally nothing." [1] "Apart from his surroundings and relationships," says Professor Ritchie, "the individual is a mere abstraction, a logical ghost, a metaphorical specter, a mere negation." [2] The much-admired individual, self-centered and self-contained, is, indeed, not very far from the strong and solitary wild beast.

The Interests of the Individual not Separate from those of Society

The distrust, not to say hostility, of the laissez-faire theorists to government because of the errors or abuses of particular governments in the past is childish. It is wholly wrong to take the position that because governments have made mistakes in the past, or because their agents have sometimes abused the powers intrusted to them, they cannot

[1] Montague, "Limits of Individual Liberty," p. 57.

[2] "Principles of State Interference," p. 11.

be trusted in the future; or that because sumptuary laws are wrong, factory and sanitary legislation must be wrong as well; or that because municipally constructed sewers have sometimes produced typhoid fever, cities in the future should leave the construction of their sewer systems to private enterprise; or that because some poor laws have proved ineffective, the state should abandon altogether the policy of poor relief. The laissez-faire writers never tire of parading and exaggerating the mistakes which governments have made in the past, and when they are all collected and put on exhibition, they constitute what to some is a strong indictment against state interference. "The state lives in a glass house," observes Huxley; "we see what it tries to do, and all its failures, partial or total, are made the most of. But private enterprise is sheltered under good opaque bricks and mortar. The public rarely knows what it tries to do and only hears of its failures when they are gross and patent to all the world." [1] We may well ask, with Lord Pembroke, "What would private enterprise look like if its mistakes and failures were collected, and pilloried in a similar manner?" [2] It may readily be admitted, observes an able writer, that government is weak and inefficient at times and obedient to private interests, but it does not follow from such an admission that government ought to be made "weaker, corrupter, and more inefficient by practicing the illogical doctrine of laissez faire." [3]

Mistakes of the State exaggerated by the Laissez-faire Advocates

The laissez-faire assumption that each individual knows his own interests better than the state can know them, and is therefore the best judge of what is good for him and if left to himself will follow those interests, is true only in a limited sense, and is still less true of classes. This is readily admitted by some individualist writers like Mill.[4] Sidgwick, an unusually fair and judicial writer, discussing

The Individual not always the Best Judge of his Own Interests

[1] "Critiques and Addresses," p. 9. [2] "Liberty and Socialism," pp. 39–40.
[3] H. C. Adams, "Relation of the State to Industrial Action."
[4] See Mill's "Essay on Liberty."

this assumption, well says: "But it seems to me very doubtful whether this can be granted; since in some important respects the tendencies of social development seem to be rather in the opposite direction. As the appliances of life become more elaborate and complicated through the progress of invention, it is only according to the general law of division of labor to suppose that an average man's ability to judge of the adaptation of means to ends, even as regards the satisfaction of his everyday needs, is likely to become continually less." [1] If every man, observes the Belgian writer Laveleye, could see clearly and judge accurately of his own interests, rights, and duties, then pursue them, and do voluntarily what he ought to do and nothing that he ought not to do, the necessity for state intervention would disappear and we should enjoy the reign of liberty.[2] But the very point of the matter is that ignorant people cannot take precautions against dangers of which they are ignorant. No one lives in a badly drained house, drinks water polluted with sewage, or eats adulterated food because his interest leads him to do so, but generally because he is ignorant of the real character of the service or article which he consumes or because he cannot help himself.[3] Not only is the individual not always a competent judge of his own interests as an economic consumer, but in affairs of personal conduct he is often not to be trusted, particularly in matters relating to his health or safety or moral welfare. The truth is the state may be a better judge of a man's intellectual, moral, or

[1] "Political Economy," p. 416. Compare also Mill, "Political Economy," vol. II, p. 537, who accepts the proposition that the consumer is a competent judge of commodities only with "numerous abatements and exceptions." "The individual," says Mill, "is likely to be the best judge (though even this is not universally true) of the *material* objects produced for his use, but there are other things which are chiefly useful as tending to raise the character of human beings, of the value of which the individual is incompetent to judge."

[2] "Le Gouvernement dans la Démocratie," p. 24.

[3] Cf. Jevons, "The State in its Relation to Labor," p. 43.

physical needs than he is himself, and it may rightfully protect him from disease and danger against his wishes and compel him to educate his children and to live a decent life.

Practice of Modern Governments against the Laissez-faire Doctrine

The practice of all modern states is in fact in harmony with this view. Few, if any, governments leave their citizens to find out for themselves what is healthy food; what physicians, surgeons, and druggists are qualified to practice; or what conditions of work are safe or dangerous. Most governments prescribe conditions under which certain dangerous occupations shall be carried on and refuse to permit them to be dispensed with even with the consent of those who would be endangered. All governments prohibit the exercise of certain callings of a quasi-public character, except by persons who are able to show by examination or otherwise that they possess the requisite qualifications to insure the public against incompetent service. Evidence of competency is generally required of physicians, apothecaries, engineers, pilots, and even of barbers and plumbers. The state goes even further and undertakes to protect the individual against the consequences of his own acts, as where it limits the number of hours of labor in mines and factories, and prohibits women and children from engaging in certain injurious trades.

Objection to Centralized Regulation not to Local Regulation

Much of the individualistic distrust of government is due, as Sir Frederick Pollock has pointed out, to the failure to distinguish between centralized government and local self-government.[1] A good deal of the objection which the individualists urge against government would be justified if it were centralized government that is complained of, but the objection is not always well founded, when directed against local government, through local bodies directly under the eye of the people concerned. There is a vast difference, for example, between the "nationalization" and the "municipalization" of an in-

[1] "History of the Science of Politics," p. 123.

dustry, and there is an equal difference between national regulation of individual conduct and control by locally elected bodies. Manifestly the same objection cannot be urged against a local health regulation that would be applicable to a national quarantine law. Individualists, likewise, in their wholesale condemnation of government usually overlook the distinction between government, popularly constituted and controlled, and bureaucratic, irresponsible government. It is difficult to see, in many cases, why a public utility owned by the government, but under immediate control of the people of the locality, should be more feared and distrusted than one under the management of a private company not amenable to public opinion or popular control.

Inadequacy of Regulation

Spencer's doctrine of "negative regulation," which would limit the function of the state to redressing rather than preventing wrongs, would in many instances defeat the ends of the state. Thus, if the only security provided by the state against unsanitary plumbing, adulterated foods, incompetent practitioners of medicine or apothecaries, consisted of the right to sue the negligent plumber, the dishonest milk dealer, or the incompetent physician or druggist, instead of requiring plumbers to give bonds for the efficient discharge of their duties, physicians and druggists to pass examinations or otherwise furnish evidence of capacity, milk to be inspected, etc., the protection afforded would in many cases be inadequate, since the injury could not be redressed by a mere suit for damages. We agree with Sir Frederick Pollock that if it is negative and proper regulation to say that a man shall be punished for building his house in a city so that it falls into the street, it cannot be positive and improper regulation to say that he shall so build it that it will not appear to competent persons likely to fall into the city street. If it is purely negative regulation, and therefore proper, to punish a man for communicating an infectious disease by

neglect of common precautions, it is not improper to require precautions, where the danger is known to exist, without waiting for somebody to be actually infected.[1] The individualists show a distorted notion of liberty when they contend, as they do in effect, that the individual has a right, if he wishes to keep his premises in an unsanitary condition, to discharge his sewage where he will, to spread disease among his neighbors, to sell unwholesome food and drugs to whomsoever will buy. If the state has the right and duty to protect by preventive measures the individual against violence and fraud, it has the same right and duty to protect him against acts the consequences of which will be to inflict upon him injuries which cannot be redressed. There is, as Huxley well says, no very great difference between the claim of an individual to go about threatening the lives of his neighbors with a pistol, and his claim to keep his premises in a condition which threatens the health and lives of his fellow men.[2] The same is true of the right and duty of the state to protect the individual against the dangers incident to modern industrial processes, such as those resulting from dangerous machinery, from bad ventilation, from unsanitary workshops, from fire, and even from unfair contracts of labor. The freedom of contract is a taking phrase, as has been aptly remarked, and to many it is a conclusive argument against state intervention in industrial matters; but when it refers to an agreement between a capitalist and an ignorant laborer who is at the mercy of his employer, there is no equality. The doctrine of freedom has no sanctity in such cases. There is really no illegitimate interference with the freedom of contract when the state undertakes to prescribe the conditions under which contracts shall be entered into between parties one of whom is really not on a free and equal footing with the other.

Duty of the State to prevent Injury as well as to redress it

No such Thing as Unlimited Freedom of Contract

[1] "History of the Science of Politics," p. 125.

[2] "Administrative Nihilism," in his "Critiques and Addresses," p. 10.

Laissez-faire Doctrine is Sound within Certain Limits

Nevertheless, when all is said against the laissez-faire doctrine that can be said, it must be admitted that up to a certain point the weight of evidence is on its side. The proposition that the individual is the best judge of what contributes to his own happiness and that he will prosper most under a system of liberty and free competition is in most cases a sound one and ought in practice, as Sidgwick and Cairnes have shown, to be deviated from only in special cases where there are strong empirical reasons for believing that the general assumption is not true. The doctrines of the individualists, while in many cases productive of harm, have not been entirely without a good effect. They have, as an able economic writer has observed, "taught the people not to confound public morality with a state church, public security with police activity, or public wealth with government property." They have "taught men that, as society develops, the interests of its members became more and more harmonious; in other words, that rational egoism and rational altruism tend to coincide." [1] The principal fault with them has been their disposition to exaggerate the completeness of this coincidence in the existing imperfect stage of human development, and in assuming that freedom will do everything for society, economically and morally.

IV. THE SOCIALISTIC THEORY

Socialism regards the State as a Positive Good

Directly opposed to the laissez-faire theory of state functions is what, for lack of a more suitable term, we may call the socialistic theory, which contends for a maximum rather than a minimum of government. The supporters of this theory, instead of distrusting the state and looking upon it as an evil whose functions should be restricted to the narrowest possible limits, regard it as a supreme and positive good; and hence its mission should include the

[1] Hadley, "Economics," p. 14.

promotion of the common economic, moral, and intellectual interests of the people. "A socialist," says Professor Ely, "is one who looks to society organized in the state for aid in bringing about a more perfect distribution of economic goods and an elevation of humanity; the individualist regards each man, not as his brother's keeper, but as his own, and desires every man to work out his own salvation, material and spiritual.[1] It must not be understood, however, that the advocates of state socialism attach any less importance to individual freedom than do the individualists. On the contrary, they regard it as all important and differ from the individualists only in holding that it can be better secured through state action than through the laissez-faire policy, which permits unrestricted competition.

The Different kinds of Extensionists

Those who advocate a wide extension of state activity may be grouped into several classes according to the nature and extent of the rôle which in their opinion the state should play. First, there are the extreme socialists, who advocate collective ownership and management of all industries, including land and capital, and the instruments of production and transportation. They would substitute state management of industry in the place of private management, and joint ownership of the instruments of production in the place of individual ownership, thus making of the state a vast compulsory coöperative commonwealth in which the means of production, distribution, and exchange are under the control of government.[2] Under such a system the state would become the principal owner of the wealth of the country,

Extreme Socialists

[1] "Any legislation," says Bruce Smith, "which attempts the equalization of social conditions, that is, such as involves interference by the state beyond the limits at which that interference is necessary to secure equal liberties or equal opportunities, is socialism." "Liberty and Liberalism," p. 618.

[2] Cf. J. S. Mill, "Fortnightly Review," April, 1879; Ely, "Socialism and Social Reform," p. 10; Rae, "Contemporary Socialism," pp. 379, 399; Hadley, "Economics," p. 15; Flint, "Socialism," p. 16.

and there would be no private property except perhaps in things actually used by each individual.[1] Socialism of the present time, says an able writer on the subject, extends the state's intervention from those industrial undertakings it is best fitted to manage well to all undertakings of whatever character, and from the establishment of those securities for the full use of men's energies to the attempt to equalize in some way the results of their use of them. It may be less shortly described as aiming at the progressive nationalization of industries with a view to the progressive equalization of incomes.[2]

Demands of Pure Socialism

Some extreme socialists, indeed, would have the state guarantee work to everybody, lend them money without interest, furnish them with the implements of labor, build houses for them, give them farms, strike bargains for them, provide pleasures for them, and in fact supply all their wants, economic, social, intellectual, or otherwise.[3] The socialists of the United States in their national platform demand that the machinery of production shall be owned by the people in common; that the national government shall obtain possession of the mines, railroads, canals, telegraphs,

[1] Socialists, however, refuse to identify socialism with communism or with paternalism or state socialism. Communism, they maintain, stands for the holding of all things in common, while socialism emphasizes community of industry, production, and distribution only. Moreover, socialism, they say, does not mean a mere expansion of state functions such as is implied in the notion of paternalism. Socialists do not favor increasing governmental control merely for the sake of adding power to the government, but rather because they believe the individual would have more freedom than he now has. Their idea of the state is rather that of a fraternal coöperative commonwealth than a paternal state. The socialists of Germany, for example, were bitter opponents of the state socialism of Bismarck, which they asserted did not aim at the social and economic amelioration of the people, but rather at the extension of the power of the bureaucracy. In England, where democracy has made greater headway than in Germany, the distinction between socialism and what is called state socialism is not so sharp. The socialism of the English Fabian society, for example, is in reality what is called state socialism.

[2] Rae, "Contemporary Socialism," p. 399.

[3] Cf. Adams, "Relation of the State to Industrial Action," p. 475.

telephones, and other means of public transportation and communication, which shall be operated on the coöperative plan under the control of the federal government; that the municipal governments shall obtain possession of the local railways, ferries, waterworks, gas works, electric light plants, and all industries requiring municipal franchises, to be operated on the coöperative plan under municipal control; that inventions shall be free to all; that education shall be free and compulsory; that the state shall assist poor school children with food, clothing, and books; and that employment on the public works shall be provided by the state for the unemployed.[1]

Arguments in Favor of Socialism

The principal arguments advanced in favor of the socialistic state are the following: Under the present system of economic organization, the laboring man does not receive the fruits of his toil. A large part goes to reward capital or to pay for the services of those who direct and supervise the employment of labor, or to speculators and middlemen, and too little to those who are the real producers.[2] In short, society under the present system is organized in the interests of the rich and leads to grave inequalities of wealth and of opportunity. The means of production are being monopolized by the few who

Present System unjust to Toilers

[1] For various socialistic programmes, see the appendix to Kirkup's "History of Socialism." The Knights of Labor, an organization with ends somewhat socialistic, demands the establishment of bureaus of labor statistics; free public lands for settlers; laws for the protection of the health and safety of those engaged in the mining, manufacturing, and building industries; compulsory arbitration of labor disputes; laws for the protection of children in factories; a tax on incomes; government savings banks; government ownership of telegraphs, telephones, and railroads; a coöperative industrial system; etc., — in order to "secure the toilers a proper share of the wealth they create; more of the leisure that properly belongs to them; more social advantages; more of the benefits, privileges, and emoluments of the world, — in a word, all those rights and privileges of enjoying, appreciating, defending, and perpetuating the blessings of good government." The Socialist Workingmen's Party of Germany demands free and universal education by the state, legislation for the protection of the health and lives of workingmen, sanitary control of workingmen's dwellings, inspection of mines, more effectual employers' liability acts, etc.

[2] Graham, "Socialism," p. 185.

exploit the masses; if indeed private competition has not been largely eliminated through the organization of trusts and combinations. The state should therefore take control of all the land and capital or means of production now being used for the exclusive benefit of the owning class. Under the individualistic régime industrial competition has become so fierce that the industrially weak have no chance of success and cannot survive in competition with the rich; they are growing relatively poorer and becoming more dependent upon the employing class, while the rich are growing richer and becoming more independent. The theory of socialism, it is argued, is founded on principles of justice and right. The land and the mineral wealth contained therein should belong equally to all, not to a few. They are nature's gift to the human race, and ought not to be appropriated by the few any more than sunlight, air, or water. The same is true as regards the instruments of production.[1]

Socialism is founded on the Principles of Justice

Competition under the present system not only leads to injustice and the crushing out of the small competitor, but it involves enormous economic waste and extravagance in the duplication of services. The system of unrestricted competition leads to lower wages, overproduction, cheap goods, and unemployed workers. The only remedy for such a condition, say the socialists, is the abolition of competition and the substitution of the coöperative principle, under which equality of opportunity and equality of reward and economy of production will be secured.

It will produce a Higher Type of Individual Character

Under the socialistic régime, it is asserted, a higher type of individual character will also be produced and a larger degree of real freedom. Such industrial competition as we have to-day tends to beget materialism, unfairness, dishonesty, and a general lowering of the standard of individual character. Man is naturally weak and inclined to depravity, and the present system of economic individual-

[1] See Kirkup, "History of Socialism," p. 11.

ism serves to accentuate his weakness and dishonesty. He needs, therefore, to be guided and aided by the state and protected against his own inherent frailties.

Socialism to a Certain Extent is already followed in Practice

The doctrine of socialism, moreover, is really in harmony with the organic theory of the nature of the state, which teaches that society is an organism, not a mere aggregation of individuals, that the good of all is paramount to that of a few, and that in order to secure the good of the greatest number the welfare of the individual as such must be subordinated to that of the many.

Finally, it is argued by the socialists that the state has already abolished competition in certain fields and introduced in its place the coöperative principle and has demonstrated its success as an industrial manager to the entire satisfaction of all candid and thoughtful men. Government management and control of the postal service, government coinage, government ownership and operation of railroads, telegraphs, mines, and other industries of a public nature in various countries have all established the advantages of collective management over private management, and thus fully justified the wisdom of the principle of socialism. Then why should the state not go further and occupy the entire field? Why should it not organize all labor as it has already done a part, and apportion the products of industry on the basis of each man's rightful share as the principles of justice require?[1] Collective ownership and management, it is maintained, is thoroughly democratic; indeed, socialism is the "economic complement of democracy"; it rests upon both ethical and altruistic principles and is the only system under which efficiency and justice in production can be secured and under which a full and harmonious development of individual character can be realized.[2]

[1] See Graham, "Socialism," p. 11.

[2] Kirkup, "History of Socialism," pp. 10–12. For a summary of the good socialism has already accomplished, see Kirkup, ch. 11.

Arguments against Socialism

Against the socialistic theory the chief argument advanced is the difficulty, if not the impossibility, of realizing in practice the system which it advocates. The ideas of the extreme socialists are in many respects fantastic and would prove impracticable, both on account of reasons of an economic character and for others which are inherent in the constitution of human nature itself. There have always been some men who believed that the state was both omniscient and omnipotent and that it has only to issue a decree saying, "Let misery and inequality be abolished," and it will be done forthwith.

False Premises

The socialistic theory starts from a false premise when it maintains that private property in land and the instruments of production is not only wrong morally but also economically. To substitute collective ownership for private ownership, even if it were practicable, would tend to destroy one of the most powerful mainsprings of human endeavor and the chief incentive to individual effort and industry. Take away the right of the individual to acquire property and to accumulate the product for his own use, say the opponents of socialism, and you make an end of all progress by destroying the incentive to labor. The saying of Sir James F. Stephen that to try to make men equal by altering social arrangements is like trying to make the cards of equal value by shuffling the pack, is hardly less true of all efforts to make men equal in economic matters. Socialism, says Laveleye, rests on the principle that the able, industrious, and provident should share with the stupid, the idle, the improvident, whatever may be obtained as the reward of their energy and virtues.[1] It is a system, says another critic, "which requires the state to do work it is unfit to do in order to invest the working classes with privileges they have no right to

[1] "Contemporary Review," April, 1883, p. 551. This, however, is stoutly denied by the advocates of socialism.

get." [1] The doctrine that each man should be rewarded according to his labor, when labor is understood to mean simply work with one's hands without reference to capital or skill, cannot be defended upon any rational principle of justice.[2] Even if account should be taken of the difference in the productive capacity and hence of the value of the service of different workers, the practical difficulty in applying any such rule of distinction would be insurmountable under a system of socialism. On what principle would it be possible to distribute the rewards of industry to each worker according to his share in producing when he works side by side with machines, with unskilled and skilled laborers, and with directors and supervisors? Socialism will never be practicable until there is a fundamental change in human nature, to some of whose deepest principles it runs counter. We agree with Professor Ely that it is a "glorious ideal, but it will never become a reality this side of the golden gates of Paradise." The state may provide for the poor and the infirm, and even furnish employment to the idle, but it ought not to take away from the former the motive for making voluntary provision for old age or from the latter the incentive to search for work.[3]

The Pure Socialistic State an Impossibility

One error of the socialist is that he entirely overestimates the state's capacity and efficiency. He assumes that every business managed by a joint stock concern can be as well managed by the state and ought therefore be taken over and operated by it in the interest of the public. But experience and reason are against such a view. Government in most cases is better fitted to restrain the evils of monopoly and regulate the conduct of a business which affects the public interest than it is to manage the business itself. The more numerous and diverse the functions of government, the greater the difficulties. The business of

Socialism overestimates the Capacity of the State

[1] Rae, "Contemporary Socialism," p. 379.
[2] Cf. Graham, "Socialism," p. xxxiv.
[3] Cf. Rae, "Contemporary Socialism," p. 392.

a joint stock company is usually limited to one or a few activities, while under a socialistic régime the business activities of the state would be legion. It goes without saying that there are some industries that can be better conducted by private management and to overcharge the government with the conduct of the whole complex volume of industrial activity in a modern society would lead to inefficiency, if not to a complete breakdown.[1] The problem of providing all the necessaries of life for the people of a populous state, of managing the labor and distributing the products, would be a task which no government could perform satisfactorily.[2] Under a socialistic régime, moreover, nothing would be produced except as it pleased those in authority. It would be necessary to persuade the state to produce many things that are now produced under private competition. Production would no longer be regulated by the law of supply and demand, but it would determine demand, contrary to every existing principle of political economy.[3] Besides, the calculations of the government would constantly be upset by various circumstances.[4] Everything would depend on the pleasure of the governors. A diminution in the quantity and quality of production might be expected to result from the withdrawal of the stimulus of private incentive. Government managers would be languid and without interest in the result, laborers would be without incentive and the state timid, from which there would result, says one writer,

It is Contrary to Sound Economic Principles

[1] Speaking of the inefficiency of government management, Rae observes that "the languor of the government stroke and the slow mechanism of a state department are unfavorable to an abundant production. The general slackening of industry and the extinction of those innumerable sources of active initiative which at present are so busy pushing out new and fruitful developments are too great a price to pay for the suppression of the evils of competition. To effect some economies in the use of capital we damage or destroy the forces by which capital is produced and really lose the power to save a penny." "Contemporary Socialism," p. 400.

[2] Compare Robertson in Mackay's "Plea for Liberty," ch. 1.

[3] Graham, "Socialism," p. 162.

[4] McKechnie, "The State and the Individual," p. 188.

"a diminished rate of progress, decreased production of wealth, with, finally, in all probability, a diffused poverty, which, besides being an evil in itself, is one that threatens all the higher human interests." [1]

It would mean Less Freedom instead of More Liberty

Finally, socialism would involve, not an enlargement, but a restriction of individual freedom, and a deterioration of individual character. This point has been ably emphasized by Mill, Spencer, and others.[2] Under a socialistic régime society would have to be organized and controlled to some extent like an army. In the absence of all self-interest and incentive individuals would have to be disciplined and driven to the discharge of their duties, and in the place of freedom we should, according to some writers, have virtual slavery.[3] If all industry and commerce must be managed by a central authority which has to calculate and regulate everything, observes McKechnie, it follows that all deviations from the appointed and expected routine on which these calls are based must be strenuously put down. No travesty of a healthy state, McKechnie concludes, is more deplorable than a practical socialism in the form of an absolute government directing with inquisitorial and irresistible sway every detail of

[1] Graham, "Socialism," p. 166.

[2] See Spencer's essay, "The Coming Slavery," and Mill, "Political Economy," vol. II, bk. V, ch. 11.

[3] This is the opinion of W. H. Mallock, a well-known English writer on socialism, who says: "Now if we assume that the socialistic state can, by some means or other, secure all the ablest men as the official directors of the labor of the citizens generally, there is, as I said before, nothing inherently impracticable in the proposal to guarantee to each laborer all his necessaries and his comforts in any case, and secure his industrial obedience by methods the same as those by which military obedience is secured in the case of soldiers. On the contrary, this method is one which was practiced in the earliest civilizations known to us, and was in practical operation for thousands upon thousands of years. It built the walls of Babylon. It built the pyramids of Egypt. It raised the monstrous stones of Baalbec. It was the method of slavery. It did not receive its deathblow in the civilized world till this country inflicted it within the lifetime of living men. It is this method of securing and controlling ordinary labor that, on Sidney Webb's admission, any system which is truly socialistic would reintroduce."

human life." [1] Such are some of the arguments that have been advanced by various writers against the theories of socialism as popularly understood.

The Idea of Pure Socialism has never been realized in Practice

The ideas of socialism in the form in which it has been described above have never been realized in practice in any state. The Amana and Icarian communities in Iowa, the Shakers and the Harmony Society of Pennsylvania, and various others represent attempts to realize in practice communistic principles; but they all resulted in failure and left behind only "buried hopes and aspirations." These communities, says Rae, led to the same results as in England, namely, a slackening of industry and a deterioration of the general level of comfort.[2]

Growth of State Socialism

While socialism in its extreme form has never been attempted by any modern state, all states perform various functions that are socialistic in character, some more than others; and one of the marked political tendencies of the time has been the drift in this direction.

On the Continent of Europe

The movement has been strongest on the continent of Europe, particularly in Germany, since the founding of the empire. There the state operates and controls many businesses that in America are left to private enterprise, and

[1] "The State and the Individual," pp. 177, 192–193; compare also the estimate of Sir Erskine May ("Democracy in Europe," Introduction, p. lxv), who, speaking of the socialistic doctrine, says: "The natural effect of such theories would be to repress the energies of mankind; and it is their avowed object to proscribe all the more elevated aims and faculties of individuals. . . . The individual man is no more than a mechanical part of the whole community; he has no free will, no independence of thought or action. Every act of his life is prescribed for him. Individual liberty is surrendered to the state; everything that men prize most in life is to be taken out of their hands. Their religion, their education, the management of their families, their property, their industry, their earnings, are dictated by the ruling powers. Such a scheme of government, if practicable, would create a despotism, exceeding any known in the history of the world." But obviously we have here a confusion of socialism and communism, a distinction which socialists are careful to insist upon. It is but fair to remark, therefore, that much of the criticism quoted above is inapplicable to the theories of socialism, though it might well be directed against those of communism.

[2] "Contemporary Socialism," p. 402.

regulates many of the details of individual conduct that elsewhere are left uncontrolled by the state. In various countries of Europe the state owns and operates railroads, mines, banks, and breweries; monopolizes the manufacture of certain commodities like brandy, tobacco, and gunpowder; owns and operates or subsidizes theaters and opera houses; aids and encourages literature, science, and art; insures people against sickness, accidents, and old age; owns and operates wholly or in part the instrumentalities of communication and transportation; and through the local governments manages many public utilities such as waterworks, gas and electric light plants, and street railways.

In England

In England, until recently, state socialism had made little headway, but in recent years a "profound change has come over the spirit of English politics" and the state is running fast in the direction of socialism. Indeed, says Laveleye, England is now leading the nations of the Old World in this respect. England is changing from the old trust in individualism and liberty to a new trust in state regulation and from the French doctrine of laissez-faire to the German doctrine of state socialism.[1] During the last few years the English Parliament has enacted a large volume of social legislation, such as factory acts, health legislation, laws providing dwellings for the poor, employers' liability acts, workingmen's compensation acts, old age pension acts, etc., while the local governments have gone farther than those of any other country toward the municipalization of public service industries such as the water and light supply and the means of local transportation. Throughout England to-day the cities generally own and operate their own gas, electric light, and water systems; in many cases they own and manage the street railway utilities; and own public washhouses, libraries, music halls, etc. The state now operates not only the postal service but also the tele-

[1] Compare Rae, "Contemporary Socialism," p. 347.

graph and to a large extent the telephone service, operates a parcels post system, conducts postal savings banks, and performs many other services that were formerly left to private enterprise. Most of the state intervention in England, however, has been in the interest of better moral and social conditions rather than for the promotion of economic interests. Most of it, in short, has been guided by ethical rather than by economic considerations.

In Australasia

In some of the English colonies, particularly in Australia and New Zealand, where private capital has been lacking, the activities of the state have been multiplied to an extent not equaled anywhere else in the world. There a large part of the tillable land is owned by the state and rented to tenants; the coal mines and forests are likewise under state control; so are the railroad, telegraph, and telephone systems; there is also a government parcels post system and there are government savings banks.[1] The state makes loans to farmers at low rates and constructs improved dwellings for workingmen. There is a system of state insurance, not only against death and old age, but against loss by fire. The government maintains labor bureaus and a system of compulsory arbitration in labor disputes; regulates the hours of labor in various occupations and in some instances undertakes to regulate the wages of labor; constructs public works by direct labor rather than by contract, and, through the municipalities, generally owns and operates the public service industries. The state, in short, approaches more nearly the socialistic ideal than any other in the world. It is a vast landlord and employer; it engages in banking, farming, insurance, the express business, mining, and other industries. As to whether the good exceeds the evil, there is a wide difference of opinion.[2]

[1] There are but five private savings banks in Australia.

[2] For a valuable study of the subject, see W. P. Reeves, "State Experiments in Australia," vol. 2. The system is defended by Parsons in his "Story of New Zealand" and criticised by Fairfield in Mackay's "Plea for Liberty."

CHAPTER X

THE TRUE SPHERE OF THE STATE

I. THE ENDS OR PURPOSES OF THE STATE

What is the End of the State?

HAVING examined the principal theories concerning the function of the state, we come next to inquire what is its natural and proper sphere. Is it the sphere which the laissez-faire theorists have marked out or that of the socialists, or is it neither? In order to determine what is the proper domain of state action it is necessary first of all to determine what is the end or purpose of the state. It is also well to remember at this point that the functions of government, as Mill has shown, are not a fixed thing; that they are much more extensive in an advanced state of society than in one which is still in a backward state. The fact must also not be overlooked, as the same distinguished writer has truthfully remarked, that "the proper limits of the functions and agency of government" is "one of the most disputed questions both in political science and in practical statesmanship."[1] Any conclusion, therefore, that we may reach with regard to the subject, unless it be of the most general character, will not be universally accepted. Whether the state should do this or that can only be answered, observes Sir Frederick Pollock, by going back to the old question, "What does the state exist for?"[2] Is it an end in itself or only a means to an end?

The Ancient Conception

The ancients generally considered the state to be an end rather than a means to the realization of an end. There was hardly any realm within which the individual was con-

[1] "Political Economy," vol. II, p. 385.

[2] "History of the Science of Politics," p. 124.

sidered to be free as of right; no part of his life was acknowledged to be sacred from the intrusion of the state. The old Mosaic law regulated almost every concern of his daily life, — what he should eat and when, how his food should be cooked and served, the kind of clothes he should wear, and when and whom he should marry, etc. Nor was legislation of this character peculiar to the Hebrews. It was common among the Greeks and Romans and, to a less extent, among the early Germans. In short, the idea of individual interests as distinct from the general interests was non-existent.[1] The individual was always under the eye of the state; his conduct was regulated and his life determined for him with such minuteness that he was regarded as existing for the state rather than the state for him. Individual freedom was overlooked or its importance minimized, while the state was exalted and glorified as if it were everything and the individual nothing. Modern political thought and practice, however, reject the view that the state is an end rather than a means. It considers the state to be simply an institution, an agency or instrumentality by means of which the collective ends of society may be realized, instead of itself being the end.[2]

Viewpoints and Distinctions

In considering the ends or purposes of the state we may distinguish between its ends in general, and the particular ends of a given state. We may also distinguish between the ultimate ends and the primary, immediate or prox-

[1] Cf. Laboulaye, p. 107; Esmein, "Droit constitutionnel," p. 377.

[2] Compare Bluntschli, "Allgemeine Staatslehre," bk. V, ch. 1. Some modern political writers, however, regard the state as an end in itself. See, *e.g.*, Ritchie, ("Principles of State Interference," p. 102), who remarks that since the best life can be realized only in the state, the state is not a mere means but an end in itself. Substantially the same opinion is expressed by Villey in his "Rôle de l'État," pp. 8–9, and by Hegel in his "Philosophie des Rechts." Willoughby ("Nature of the State," p. 317) remarks that whether the state is an end or a means depends on the viewpoint. From the purely individualistic viewpoint it is only a means, an instrumentality, or an expedient through which the highest possible development of humanity is obtained. But if the state is considered as an institution distinct and apart from the citizens who compose it, it is, of course, he says, an end in itself.

imate ends.[1] The German writer Holtzendorff, in his "Principien der Politik," distinguished between the real ends of the state (*die realen Staatszwecke*) and the ideal ends (*die idealen Staatszwecke*).[2] The real ends of the state, he said, are: first, the development of the national power (*der nationale Machtzweck*); second, the maintenance of individual liberty (*der Freiheits- oder Rechtszweck*); and, third, the promotion of the social progress and civilization of the people (*der Gesellschaftliche Culturzweck*). In short, national power, individual liberty, and the civilization of mankind, stated in the order of their importance, according to Holtzendorff are the real ends of the state. The first mentioned is the primary end; the last, the ultimate or secondary end. Neither conflicts with the other, but there exists harmony of purpose between them; and the great mission of the state cannot be fully realized by neglecting one at the expense of the other.[3]

Holtzendorff's Conception

Bluntschli followed Holtzendorff in rejecting as too narrow and fruitless the "justice" theory (*Theorie des Rechtszweckes*), which considers the end of the state to be merely the maintenance of justice among men; and the "morality" theory (*Theorie des Sittlichkeitszweckes*), propounded and exploited by Hegel, which regards the mission of the state to be the realization of the moral law. Bluntschli, like Holtzendorff, attaches great importance to the "general welfare" theory (*Theorie des Wohlfahrtszweckes*), though he points out the mischief arising from the lack of an exact test for determining what constitutes the general welfare. He shows that it has been the cloak for covering many

Opinion of Bluntschli

[1] On the distinction between the ideal and the real ends of the state, see Holtzendorff, "Principien der Politik," ch. 7, and Bluntschli, *op. cit.*, bk. V, ch. 2; on the distinction between the ends of the state in general and those of a particular state, see Willoughby, *op. cit.*, p. 309; between the specific and general purposes of the state, see Von Mohl, "Encyklopädie der Staatswissenschaften," p. 77; between primary, ultimate, and secondary ends, see Burgess, "Political Science and Constitutional Law," vol. I, p. 85.

[2] Chs. 7–8. [3] *Ibid.*, ch. 11, "Die Harmonie der Staatszweck."

political sins and the justification for many arbitrary and despotic acts of the state. To say that the primary and fundamental purpose of the state is the furthering of the common welfare does not bring us very near to the solution, since it does not tell us what is the common welfare. It is very much like saying that the duty of the citizen is to keep to the path of virtue, without telling him what virtue is or where the way lies. Bluntschli himself distinguishes between the "proper and direct" and the "indirect" ends of the state. The former relate to the state itself and consist in the development of the national strength and capacity and the perfecting of the national life; the latter relate to the individual and consist in the maintenance of his freedom and security.[1] These ends, Bluntschli maintains, embrace everything that can properly be regarded as legitimate aims of the state. To us, however, the development of the national power seems rather a means than an end, the end being the security, liberty, and welfare of the people composing the state.

Views of Von Mohl and Burgess

Von Mohl, another famous German writer on political science, conceived the end of the state to be the promotion of the life purposes of the people (*die Förderung der Lebenszwecke des Volkes*).[2] Burgess advances the view that the purposes or ends of the state may be classified as *primary*, *secondary*, and *ultimate*. The ultimate end, which he considers first, is (following Holtzendorff and Bluntschli) the perfection of humanity, the civilization of the world, and (following Hegel) the establishment on earth of the reign of virtue and morality. The secondary end is the perfection of the principle of nationality in the state and the development of the national genius and the national life. The primary end is the establishment of government and liberty. To state them in their historical order, they are, he says: first, the organization of government and liberty,

[1] "Allgemeine Staatslehre," bk. V, ch. 4.

[2] "Encyklopädie der Staatswissenschaften," pp. 71, 76.

so as to give the highest possible power to the government consistent with the highest possible freedom in the individual; to the end, secondly, that the national genius of the different states may be developed and perfected and made objective in customs, laws, and institutions, from the standpoint furnished; by which, finally, the world's civilization may be surveyed upon all sides, mapped out, traversed, made known and realized.[1] But here again we have what seems to be a confusion of ends with means. It is difficult to see, for example, why the establishment of government should be considered as an end to be realized rather than the means through which ends are sought. It is, as we have said, the testimony of nearly all writers that government is merely the agency or instrumentality through which the ends of the state are realized, and not one of the ends itself.

Other Views

Many other attempts have been made by political writers to formulate concisely the doctrine of the ends of the state. Locke, for example, stated that the end of government was "the good of mankind"[2] — "the noblest and briefest" statement of the purpose of government, says Huxley, that was ever formulated.[3] But the good of mankind is something which is not absolutely fixed for all men, regardless of conditions and circumstances, and there is far from being any common agreement concerning its constituent elements. Professor Ritchie, in his "Principles of State Interference," conceives the end of the state to be simply the realization of the best life by the individual.[4] Edmond

[1] "Political Science and Constitutional Law," vol. I, p. 89.

[2] "Two Treatises of Government," sec. 229. Elsewhere, however, Locke said "the great and chief end of men uniting into commonwealths and putting themselves under government is the preservation of their property." *Ibid.*, ch. 9.

[3] "Critiques and Addresses," p. 23.

[4] p. 102. Adam Smith, in his "Wealth of Nations" (bk. IV, ch. 9) declared that the state had but three great duties: first, that of protecting society from the violence or invasion of other independent societies; second, that of protecting as far as possible every member of the society from the injustice or oppression of every other member of it, or the duty of establishing an exact administration

Villey, a recent French writer, in his book entitled "Le Rôle de l'État dans l'Ordre économique," says "The end of the state is first of all the maintenance of the national independence from without and the social order within; then the development and perfection of the national life, in a word, progress." [1] Laboulaye, a noted French scholar, says "the rôle of the state is to assure to the individual his entire development — the full enjoyment of his physical, religious, intellectual, and moral powers; to remove obstacles and restraints; and to promote the general progress by multiplying the means of education and putting it at the door of the most ignorant and the poorest." [2] John Stuart Mill declared that the "proper end of government was to reduce the wretched wastes due to the neutralization of the best efforts and talents of men to the smallest possible amount by taking such measures as shall cause the energies now spent by mankind in injuring one another or in protecting themselves against injury, to be turned to the legitimate employment of the human faculties, that of compelling the power of nature to be more and more subservient to the physical and moral good." [3]

View of the Author

If one more attempt to formulate a general statement of the function of the state may be permitted, I would offer the following: The original, primary, and immediate end of the state is the maintenance of peace, order, security, and justice among the individuals who compose it. This involves the establishment of a régime of law for the definition and protection of individual rights and the creation of a domain of individual liberty, free from encroachment either by individuals, or by associations, or by the government itself. No state which fails to secure these

of justice; and, third, that of erecting and maintaining certain works and certain public institutions which it can never be for the interest of any individual or small number of individuals to erect and maintain.

[1] p. 18. See also pp. xi and 59.

[2] "Le Parti Liberal," p. 6, quoted by Michel, in "L'Idée de l'État."

[3] "Political Economy," vol. II, p. 603.

ends can justify its existence. Whatever else it may ignore, it cannot neglect these considerations without failing in its greatest and most essential purpose. Secondly, the state must look beyond the needs of the individual as such to the larger collective needs of society—the welfare of the group. It must care for the common welfare and promote the national progress by doing for society the things which the common interests require, but which cannot be done at all or done efficiently by individuals acting singly or through association. This is what Holtzendorff and Bluntschli must have meant when they said that the end of the state was the development of the national capacities and the perfection of the national life. This may be called the secondary end of the state. The services embraced under this head are not absolutely essential to the existence of society but they are desirable and are in fact performed by all modern states.

Finally, the promotion of the civilization of mankind at large may be considered the ultimate and highest end of the state. This is the mission-of-civilization theory (*Theorie des Culturzweckes des Staates*) of the Germans, which has been powerfully defended and advocated by Holtzendorff, Stein, Wagner, Bluntschli, and others. Thus the state has a triple end: first, its mission is the advancement of the good of the individual; then it should seek to promote the collective interests of individuals in their associated capacity; and, finally, it should aim at the furthering of the civilization and progress of the world, and thus its ends become universal in character. Concerning what I have described as the primary and immediate ends of the state, there is no very wide divergence of opinion among political writers or statesmen. But as regards the larger ultimate ends, there is no such unanimity of opinion. While all are agreed that it is the proper function and duty of the state to create such conditions as will enable the individual to realize most completely the ends of his existence and attain the greatest

happiness and progress, there is the widest variety of opinion concerning the amount and kind of state action necessary to accomplish this end.

II. CLASSIFICATION OF STATE FUNCTIONS

Essential Functions

The functions of the state have been classified by many writers as: first, those which are necessary and indispensable; and, second, those which are optional; or, simply those which are essential and those which are non-essential; or, again, those which are socialistic and those which are not.[1] They may be classified more exactly as: first, those which are necessary; second, those which are natural or normal but not necessary; and, third, those which are neither natural nor necessary, but which in fact are often performed by modern states.[2] The last are described by some writers as "doubtful" functions. What are called the essential, normal, or constituent functions are such as all governments must perform in order to justify their existence. They include the maintenance of internal peace, order, and safety, the protection of persons and property, and the preservation of external security. They are the original primary functions of the state, and all states, however rudimentary and undeveloped, attempt to perform them. They embrace the larger part of the activities of the state and have to do principally with the conservation of society and only secondarily with social progress.

Natural but Unnecessary Functions

By natural but unnecessary functions are meant those which the state may leave unperformed or unregulated without abandoning a primary duty or exposing itself to the dangers of anarchy, but which would be neglected or

[1] Compare Mill, "Political Economy," vol. II, p. 386; and Willoughby, "Nature of the State," p. 310. Woodrow Wilson, in his work on the state, classifies them as *constituent* and *ministrant* functions, sec. 1475.

[2] See Villey, "Rôle de l'État dans l'Ordre économique," pp. 59–61; also Jourdan, "Rôle de l'État," p. 38.

at least not so well performed by private enterprise. Among such functions may be mentioned the operation of the postal service; the construction of dikes, levees, canals, public roads, bridges, and irrigation works, and works of public utility generally; the maintenance of scientific and statistical bureaus; the erection and maintenance of lighthouses, beacons, and buoys; the construction of harbors, wharves, and other instrumentalities of trade and commerce; the care of the poor and helpless; the protection of the public health and morals; elementary education; the regulation of many trades, businesses, and occupations which are affected with a public interest; and the conduct of various undertakings which would be unprofitable as private ventures but which are required by the common interest.

Functions which are neither Natural nor Necessary

Among the activities of the state which are neither essential nor natural, but which are not a matter of indifference to the public and which are performed by some states as well as by private enterprise and at less cost, are a great variety of services mainly economic and intellectual, such as: the conduct of railway traffic; the telegraph and telephone service; the manufacture and distribution of gas and electricity for lighting purposes; the furnishing of water for drinking and other purposes in cities; the maintenance of theaters, pawn shops, bath houses, and lodging houses; the encouragement of certain industries by means of bounties, protective tariffs, and subventions; the planting of colonies; the encouragement of immigration; the establishment of experiment stations, liquor dispensaries, banks, universities of learning, hospitals, reformatories, art galleries, museums, zoölogical and botanical gardens; the erection of improved dwellings for working people; the making of loans to farmers; grants in aid of railroads; the distribution of seeds for agricultural purposes; the conduct of the business of insurance; the granting of old age pensions; the maintenance of em-

ployment bureaus; and many other activities too numerous to mention. Under this head also may be included a great volume of regulatory or restrictive legislation dealing with the conduct of certain trades and occupations which are affected with a public interest, such as: railway traffic and means of communication; mining; manufacturing; the relations between employer and employees; the conduct of dangerous, offensive, or obnoxious trades; the censorship of the press; vaccination, quarantine, and sanitary legislation; laws regarding the erection of buildings in cities; laws regulating banking, barbering, baking, plumbing, pawnbroking, slaughtering, and many other trades or businesses.[1]

The first group of activities described above represent, according to the individualistic theories, all the activities that the state ought to undertake. Anything more is superfluous and involves an infringement upon the rights and liberties of the individual and cannot therefore be justified.

III. OBSERVATIONS AND CONCLUSIONS

Neither Individualism nor Socialism the Modern View

Regarding the merits of the individualistic and socialistic theories of state functions, but one conclusion is possible—neither represents the modern view of the sphere and duty of the state. As Huxley aptly remarks, individualism and socialism are out of court so far as the establishment of their claims is concerned. The state is neither a *gendarme* nor an *entrepreneur* of public felicity; neither a mere police contrivance for securing order nor an "epicurean engine for the manufacture of general comfort."[2] The question of what are the functions of government, observes Huxley, is met by the answer

[1] This restrictive legislation is classified as "unnatural," though under the complex conditions of modern times it may well be questioned whether it is not more natural than unnatural.

[2] Compare Villey, "Rôle de l'État," p. 14; and Montague, "Limits of Individual Liberty," p. 168.

to the question "What ought we men in our corporate capacity to do, not only in the way of restraining that free individuality which is inconsistent with the existence of society, but in encouraging that free individuality which is essential to the evolution of the social organization?"[1] Manifestly, however, it is impossible to draw the boundary line between legitimate and illegitimate state interference as we would draw a boundary line on a map, because it is a line which must change with the altered conditions and needs of society.[2] No hard and fast rule, no fixed principle governing the division, can be laid down; no *a priori* solution of the question can be found. In the highly complex society of to-day it is difficult to see how any limit can be set to the extent to which under some circumstances the action of government may be carried. The question of where to draw the line between those things with which the state ought and ought not to interfere is one which must be left to be decided separately for each individual case.[3] Dogmatists have frequently undertaken, on the basis of theoretical discussions of the nature of liberty, to lay down what things the state ought to do and what things it ought not to do — that is, how wide should be the province of government and how wide that of liberty; but all such attempts to solve the problem are as futile as the effort to discover the nature of light by discussions concerning the nature of darkness. If any general rule may be formulated, it must be deduced from a consideration of the question whether the purpose of state intervention in a

No Fixed Line between Legitimate and Illegitimate State Action

[1] "Administrative Nihilism," in "Critiques and Addresses," p. 23.

[2] Compare Leon Say, "Municipal and State Socialism," p. 15. It is impossible, says Leroy-Beaulieu ("The Modern State"), to determine *a priori* the sphere of the state and that of the individual, because in life they run together and overlap each other.

[3] "It follows," says Cunningham ("Politics and Economics," p. 136), "that we cannot lay down a definite line restricting the functions of the state and making all else as of merely private and individual concern. The influence of the state permeates all our relations even those of the personal kind."

given case is for the common good, whether the proposed action is likely to be effective, and, if so, whether it can be done without doing more harm than good. If a proposed act of intervention fulfills these conditions, no valid objection can be raised to it because it violates some abstract principle of individual liberty or some doctrine of natural rights. There are a multitude of cases, as Mill has well said, in which governments with general approbation assume powers and execute functions for which no reason can be assigned except the simple one that they conduce to the general convenience; and he might have added that no further reason ought to be required. It is manifest, as he points out, that the admitted functions of government embrace a much wider field than can easily be included within the ring fence of any restricted definition, and it is hardly possible to find any ground of justification common to them all except the comprehensive one of general expediency.[1]

In spite of our disagreement with the laissez-faire theorists on so many points, we agree with Mill when he says that, "Whatever theory we adopt respecting the foundation of the social union, and under whatever political institutions we live, there is a circle around every human being which no government, be it that of one, of a few, or of many, ought to be permitted to overstep; there is a part of the life of every person who has come to years of discretion, within which the individuality of that person ought to reign uncontrolled either by any other individual or by the public collectively."[2] Mill's theory that this circle should include all that part which concerns only the life of the individual and which does not affect the interests of others, or which affects them only through the influence of moral example, is undoubtedly a safe proposition so far as the purely repressive sphere of the state is concerned; but

[1] "Political Economy," vol. II, pp. 391, 392.

[2] *Ibid.*, p. 568; see also his essay on Liberty.

it does not take account of that larger liberty which comes from wisely directed state aid and guidance in the interests of social efficiency. Moreover, the impossibility of drawing any definite lines of separation between the "individual" and "social" spheres necessarily renders all such propositions of little practical value.

Police Duty not the Sole Mission of the State

Upon one point, most men are now agreed; namely, that the state has a higher mission than the mere police duty of maintaining peace, order, and security among individuals, and that it ought to do more for its citizens than merely prevent them from robbing or murdering one another. Nothing, as Huxley observes, "can be less justifiable than the dogmatic assertion that state interference beyond the limits of home and foreign protection must under all circumstances do harm."[1] The state does not do all that it can or ought to do when it merely protects the individual from violence and fraud and leaves him alone to struggle against ruinous conditions which the state alone is capable of removing. In the beginning of human societies, as Leroy-Beaulieu has pointed out, the principal function of the state is the maintenance of defense against outside aggression and the preservation of domestic order within; but in proportion as society emancipates itself and increases in population and complexity, as it passes from the savage to the barbarous and from the barbarous to the civilized stage, a wider duty than that simply of a policeman is laid upon it, namely, that of contributing to the perfection of the national life, to the development of the nation's wealth and well-being, its morality, and its intelligence.[2]

[1] "Administrative Nihilism," in his "Critiques and Addresses," p. 10. "The business of the state," said Thomas Hill Green, "is not merely the business of a policeman, of arresting wrong-doers, or of ruthlessly enforcing contracts, but of providing for men an equal chance, as far as possible, of realizing what is best in their intellectual and moral natures."

[2] "The Modern State," ch. 5. "We are often told," says Cunningham, in his "Politics and Economics" (p. 140), "that the business of the state is to protect person and property, and those who announce this view think they have found a

It is legitimate intervention for the state to go in social reform as far as it goes in judicial administration, namely, to secure for every man as effectively as possible those essentials of rational humane living which are really every man's right, because without them he would be maimed, mutilated, deformed, and incapable of living a normal life. The same reason, says a well-known writer, which justified the state at first in protecting person and property against violation, justified it yesterday in abolishing slavery, justifies it to-day in abolishing ignorance, and will justify it to-morrow in abolishing other degrading conditions of life.[1]

The State should encourage Literature, Art, and Science

It is an equally legitimate duty, we believe, for the state to encourage certain of those higher activities of life, like science, literature, and art, which contribute to the civilization of a nation, when they cannot be had without such aid or encouragement. A nation which does not produce and does not care for such things can have, as Lecky has truly remarked, only an inferior and imperfect civilization.[2] State expenditures for the support and encouragement of art add to the dignity of a nation and to the education of its people; and most states in fact appropriate money for maintaining picture galleries, museums, and art schools. We agree with Edmund Burke that the state "is not a

formula which defines the range of state action pretty closely, . . . but it is idle to contend that the prime function of a state is to defend person and property from *physical* agents; the state is expected to intervene to protect life and property from human agents and to control human conduct, but not always or generally to prevent and relieve misery which has accrued from physical conditions unless these physical conditions are more or less under human control."

[1] Cf. Rae, "Contemporary Socialism," pp. 396–397. Compare a recent statement of Joseph Chamberlain that "it belongs to the authority and duty of the state, that is to say of the whole people acting through their chosen representatives, to utilize for this purpose all local experience and all local organization to protect the weak and to provide for the poor; to redress the inequalities of our social condition and of the struggle for existence, and to raise the average enjoyment of the majority of the people." Speech of April 25, 1888, quoted by Bruce Smith in his "Liberty and Liberalism," p. 62.

[2] "Democracy and Liberty," vol. I, p. 275. Cf. also Pollock, "History of the Science of Politics," p. 125.

partnership in things subservient only to the gross animal existence of a temporary and perishable nature," but "a partnership in all science, a partnership in all art, a partnership in every virtue and in all perfection." Besides administering justice and protecting life and property, it is the plain duty of the state to see to it that the social and economic conditions under which the individual is compelled to live are such that he can develop his latent abilities, make the most of the faculties with which he is endowed by nature, and thus realize fully the ends of his existence. In short, the state should be an instrument of economic and social progress. It should be the representative of social perpetuity, says Leroy-Beaulieu, and should see to it that the general conditions of rational existence do not deteriorate. This is the least that it can do, and it ought to do something toward the amelioration of those conditions.[1] It ought, declares Dupont-White, to take the lead in promoting progress because it is more interested than the individual, has higher moral standards, and is able to accomplish larger things for the public good than can be accomplished under private enterprise.[2]

The State should be an Instrument of Social and Economic Progress

The eminent Belgian writer Laveleye takes the same view of the mission of the state when he declares that it is something more than a mere organ of protection, or a guarantor of peace and order. Its mission, he says, is to establish the reign of justice, which would not only maintain the sanctity of contracts but would aim at the realization of a certain ideal and would modify custom and convention in order to attain this particular ideal. To establish the reign of law and of justice necessitates an active and varied intervention by the state in the social and economic arrangements of the people, where many iniquities, the heritage of the past, still survive.[3]

[1] "The Modern State," p. 120.

[2] "L'Individu et l'État," especially chs. 5 and 7. Compare also Michel, 'L'Idée de l'État," pp. 572 ff.

[3] "Le Gouvernement dans la Démocratie," vol. I, p. 19.

Regulation of Private Monopoly

It is the duty of the state to enforce contracts, but it may also be its duty to prescribe the conditions under which contracts in certain cases shall be valid and entitled to the protection of the state, especially when one of the contracting parties is really not free. The state ought to regulate or supervise the conduct of industries which are natural monopolies; but it may also be its duty to take the business out of the hands of private individuals and operate it itself as a means of protecting society from inefficient service and ruinous prices. The state ought to preserve for society the obvious advantages of industrial competition; and if free competition becomes impossible through the policy of laissez-faire the state ought to intervene and protect society against the evils of private monopoly.[1] And experience has abundantly shown that the policy of laissez-faire will not secure industrial freedom nor insure equality of economic opportunity in the highly complex societies of the present day.

Free competition under modern conditions is not always a beneficent social or economic principle. When it forces the level of trade down to that which characterizes the worst men in it, when it leads to inequality of opportunity instead of equality, when it tends to actual monopoly and the destruction of healthful competition, and when it results in poor economic service, it is no longer a good but an evil. The state has the undoubted power as well as the duty to determine the character of competitive action so as to render it possible for the best men instead of the worst to set the fashion and enable society to adjust its productive processes to the best possible form of organization.

Presumption in general against State Interference

Nevertheless, the presumption may in general be resolved against state interference, whether it be in the form of prohibition, regulation, or government ownership. There is a general agreement that freedom should be the rule and interference the exception; and that those who advocate state

[1] Cf. Graham, "Socialism," p. xliii.

interference should have thrown upon them the burden of proving the necessity for the proposed innovation, or, as Mill says, the "onus of making out a case." [1] Huxley's saying that an excess of abstention offers much less peril than an excess of intrusion is probably a safe principle to follow. It is admitted by nearly all writers that the state should not ordinarily undertake to do for society what individuals themselves can do as well, or better, or what when done by them is productive of better results for all concerned. The advantages which result from leaving the individual free from restriction in economic matters so long as the rights and interests of others are not impaired by leaving him alone, are manifest. The liberty of every member of the state as a man, said Kant, is the first principle in the constitution of a rational commonwealth. Most acts of state intervention necessarily involve a certain restriction of liberty upon some class, and are justifiable only when they secure the paramount or more urgent rights of others and perhaps of a more numerous class. They are certainly unjust if they hurt the one class without benefiting the other.

Freedom the Rule, Intervention the Exception

As has been said, the policy of non-interference should be the leading principle, and interference the exception; in all ordinary cases individuals should be left to shape their conduct according to their own judgment and discretion; and no interference should ever be made on any special or doubtful grounds, but only when it can be clearly made out that it will be productive of public advantage.[2]

[1] "Political Economy," vol. II, pp. 561, 569; Bruce Smith, "Liberty and Liberalism," p. 448. "Laissez-faire, as a practical rule," says Cairnes ("Political Economy," p. 251), "is incomparably the safer guide and ought not to be departed from so long as there remains any doubt as to the wisdom of the proposed departure."

[2] Cf. McCulloch, "Principles of Political Economy," p. 309; and Francis A. Walker in the Publications of the American Economic Association, vol. II, pp. 321, 322. After arguing that the burden of proof should be on the extensionists and the presumption against state action, General Walker concludes that whether the state should interfere should not depend upon any abstract considerations but upon the merits of each individual case; that in general the state should not do for the individual what he can do as well or even nearly as well for himself.

In the present state of economic and social development of the world, however, the policy of laissez-faire is impossible, much more so than it was in the days of Adam Smith and the other English individualists of his time. Profound economic, social, and political changes have conspired to create a powerful reaction against the individualism of three quarters of a century ago.[1] The modern attitude toward the function of the state is very different from what it used to be. Everywhere at the present time, instead of a spirit of hostility to the extension of the functions of the state, we find an increasing clamor for more government.

Since the middle of the nineteenth century there has been a remarkable tendency among civilized states to push their lines farther into domains heretofore left to individual freedom. It should be remembered, however, that the so-called state interference of the present century differs largely from that of the preceding centuries in being legislative rather than administrative in its nature. As Professor Seeley observes, the nineteenth century state may well be called the "legislation state."[2] During the last century the province of executive government to which we still retain our traditional hostility has been greatly narrowed. But the revised statutes of every modern state, already abnormally large, continue to grow in bulk with each passing year. Whether life under a future edition will, as Herbert Spencer maintains, be a burden and the status of the individual that of a slave, is a question which need not worry us. We agree with Jevons that, notwithstanding the multiplicity of statutes under which the modern individual must live, he is an infinitely freer and nobler creature than the wildest savage who knows no restraints but those of nature, yet who is always under the physical despotism of want.[3] Liberty,

[1] See Michel, "L'Idée de l'État," bk. V, ch. 2, on the "Dissolution of Individualism," where the reaction against individualism and the progress of state socialism are fully discussed.

[2] "Introduction to Political Science," p. 146.

[3] "The State in Relation to Labor," p. 14.

like everything else, is good or bad according to the use which is made of it. It has often been misunderstood, worshiped as a "splendid robed goddess" and treated as the only and all-sufficing end of the state. To some it has been a priceless boon, to others a curse. But, on the whole, it may be doubted whether mankind has suffered more in the past from an excess of government than from an excess of liberty. Liberty is not, as Benjamin Constant maintained, the end of all human associations,[1] but is merely a means for the realization of the fullness of individual life. To treat it as an end in itself is to misconceive the whole problem. It is, therefore, beneficial only in so far as it helps man to attain that other freedom which is an end in itself, the end of all social organization.[2]

[1] "Principes de Politique," p. 145 (ed. 1861).

[2] Montague, "Limits of Individual Liberty," p. 182. For a more detailed consideration of this subject, see an article by the writer entitled "Government and Liberty," in the "Yale Review," February, 1907.

CHAPTER XI

CITIZENSHIP AND NATIONALITY

Suggested Readings: COCKBURN on "Nationality," especially chs. 1–2; HALL, "International Law," pt. II, ch. 5; HOWARD, "The German Empire," ch. 8; MEILI, "International Commercial and Civil Law," Trans. by Kuhn, secs. 41–44; MOORE, "Digest of International Law," vol. III, secs. 372–487; also his "American Diplomacy," ch. 8; MORSE, "Citizenship by Birth and Naturalization," secs. 1–28, 131–206; OPPENHEIM, "International Law," vol. II, pt. II, ch. 3; Report of the United States Commission on the Subject of Citizenship, Expatriation, and Protection Abroad, House Document No. 326, 59th Congress, 2d Session; MUNROE SMITH, article on "Nationality" in Lalor's "Encyclopedia of Political Science"; VAN DYNE, "Citizenship of the United States," chs. 1 and 2; WEBSTER, "Law of Citizenship," pp. 1–58; WESTLAKE, "Private International Law," ch. 15; WHARTON, "Conflict of Laws," vol. I, chs. 1–2; WHEATON, "International Law," Appendix No. 1; WISE, "Treatise on American Citizenship," chs. 1, 2, 4.

I. TERMINOLOGY AND DISTINCTIONS

What is a Citizen?

THE people who constitute the state may be divided into two general classes, namely, citizens and aliens. The former class may be again divided into those who possess full civil and political rights and those who do not. Aristotle's definition of a citizen as one who has a share in the government of the state and is entitled to enjoy its honors,[1] does not therefore accord with modern theory or practice, which hardly anywhere identifies the rights of citizenship with political privilege. According to Vattel, "citizens are

[1] "Politics," bk. III, ch. 1. Cf. also Burlamaqui, who defined a citizen as one "who shares in the privilege of the state and who is properly one of its members either by birth or in some other manner, all others being simply inhabitants or cormorant sojourners." Quoted by Morse in his "Citizenship," p. 40.

the members of the civil society, bound to this society by certain duties, subject to its authority, and equal participators in its advantages." [1] "Citizens," said the Supreme Court of the United States in a noted case, "are members of the political community to which they belong. They are the people who compose the state and who in their associated capacity have established or subjected themselves to the dominion of a government for the promotion of their general welfare and for the protection of their individual as well as their collective rights." [2]

Distinction between "Citizens" and "Electors"

These definitions, however, as well as most of those found in the books, represent the popular, rather than the strictly legal, conception of citizenship. In the United States, as has been said, "citizen" and "elector" are by no means convertible terms. In all of the states there are citizens who are not electors, and in some there are electors who are not citizens. The possession of the electoral privilege is not essential to citizenship and there is no necessary connection between them.[3] A frequent source of confusion and misconception would be removed if the term "citizen" were restricted to those who enjoy full civil and political rights and a different term employed to describe all others.[4] Both the French and German languages contain suitable terms by which this distinction may be expressed. Thus in France those who enjoy full civil and political privileges are described by the term *citoyen*, while

[1] "Droit des Gens," bk. I, ch. 19.

[2] U.S. *v.* Cruikshank, 92 U.S. 542. For other definitions, see Lawrence's Wheaton, p. 892; the "English and American Encyclopedia of Law," art. "Citizenship"; and Wise, "Treatise on American Citizenship," pp. 2–4. "Nothing," said John C. Calhoun, "is more difficult than the definition or description of so complex an idea as a citizen, and hence all arguments resting on one definition in such cases almost necessarily lead to uncertainty and doubt. But though we may not be able to say with precision what a citizen is, we may say with the utmost certainty what he is not. He is not an alien." Quoted by Wise, *op. cit.*, p. 5.

[3] Cf. Mr. Justice Miller in Lang *v.* Randall, 4 Dill. p. 425.

[4] This is essentially the same distinction that the French formerly made between active and passive citizens. See, *e.g.*, the French Constitution of 1791, tit. III, ch. 1.

all Frenchmen who owe allegiance and are entitled to protection regardless of their civil or political status are designated as *nationaux*.[1] In like manner the terms *Staatsbürger* and *Staatsangehörige* are employed in Germany.[2] In the United States the word "subject" has been suggested as a suitable term which might be employed to describe the unenfranchised class, but it is open to several objections. In the first place, it is a part of the modern theory of sovereignty that all persons within the jurisdiction of the state, regardless of their civil or political status, are, legally speaking, subjects, and hence it would be erroneous to restrict the application of the term to a portion only of the population. In the second place, the fact that the term "subject" has been associated historically with the theories of feudalism and absolutism, and that it has been and still is employed to describe the relation between a hereditary monarch and those over whom he rules, has caused the term to be looked upon with disfavor in states having the popular form of government, as descriptive of a status which is inconsistent with republican institutions.[3] As descriptive of a strict legal status, however, the term "subject" is as applicable in republics as in monarchies, and but for its historical associations no valid objection could be urged against it. The employment of this term to describe the status of the inhabitants of the insular possessions of the United States certainly ought not to

The Term "Subject"

[1] For the distinction between "citizens" and "nationals," see Morse, "Citizenship," p. 124; Fœlix, "Droit international privé," bk. I, p. 54; Cordogan, "La Nationalité," p. 6; and the French Code Civil, bk. I, title I, sec. VII.

[2] Howard, "The German Empire," p. 134; Holtzendorff, "Encyklopädie der Rechtswissenschaft," vol. II, p. 527.

[3] Compare the opinion of the United States Supreme Court in the case of Minor *v.* Happersett, 21 Wall. 162, where, in distinguishing between the terms "citizen," "inhabitant," and "subject," the court said: "'citizen' is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all the states upon their separation from Great Britain and was afterwards adopted in the Articles of Confederation and in the constitution of the United States."

be objectionable.[1] It also suitably describes the members of Indian tribes;[2] and formerly it might have appropriately been employed to describe the slave class and to a less extent the class of free negroes.[3]

II. PRINCIPLES GOVERNING THE ACQUISITION OF CITIZENSHIP

The "Jus Sanguinis" and "Jus Soli" Principles

The two general sources of citizenship are birth or descent, and formal grant or conferment by the state. The acquisition of citizenship by birth is determined by one of two principles or by a combination of both. The oldest of the two is commonly known as the *jus sanguinis*, according to which the nationality of the child follows that of the parents or one of them. The other is that of the *jus soli* or *jus loci*, according to which nationality is determined by the place of birth, irrespective of the citizenship of the parents.[4] The former principle was the one generally observed by the ancients in determining nationality and allegiance and was incorporated into the Roman law. It also became a part of the law of the early Germans after the downfall of Rome. With the rise of feudalism, however, emphasizing as it did the doctrine of personal allegiance of subject to sovereign, followed by the growth of the idea of territorial sovereignty, the place of birth rather than blood or kinship came to be regarded as the decisive factor

[1] The attorney-general of the United States in his argument in the insular cases maintained with ability that the inhabitants of the insular possessions were subjects rather than citizens. But owing to the fact that the term is "foreign to our legal system, and alien to our trend of political thought," the word "national" has, he said, been suggested as one which "fits the case more accurately and bears with it no unpleasant inference of inferiority or servitude to an individual." F. R. Coudert, Jr., "Columbia Law Review," January, 1902. See also Moore, "Digest of International Law," sec. 379. See also the Report on the subject of citizenship, expatriation, and protection abroad, H. Doc. No. 326, 59th Cong., 2d ses., to be referred to hereafter as the Report of the United States Citizenship Commission.

[2] Wheaton, "International Law," ed. by Lawrence, p. 899.

[3] Opinion of Chief Justice Taney in Scott *v.* Sanford, 19 How. 438.

[4] Compare Cockburn, on "Nationality," pp. 6 ff.; and Burgess, "Political Science and Constitutional Law," vol. I, p. 223.

in determining nationality.[1] The *jus soli* rule was also strengthened by the spread of the feudal idea that birth tended to create a relationship between the individual and the land to which he was attached. In time, therefore, the *jus soli* became the law of the continent of Europe. It was introduced into England at the time of the Conquest.[2] The "reception" of the Roman law in northern Europe in the later Middle Ages, however, led to the displacement of the *jus soli* rule for that of the *jus sanguinis;* and the latter in time became dominant throughout the greater part of Europe, and spread to Latin America, where it prevails for the most part to-day.

According to the *jus sanguinis* in its pure form, children, as has been said, take the nationality of their parents without regard to the place of birth. If, therefore, the father is a citizen or subject of the state where the birth takes place, the children are citizens or subjects; if he is an alien, the children are aliens. The law of Austria, for example, declares that "citizenship is inherent in the children of Austrian citizens by virtue of birth."[3] The French law declares that all persons born abroad of French fathers shall be considered French citizens. The Italian law likewise treats as citizens all children whose fathers are citizens.[4] A similar rule prevails in many other states. According to the principle of the *jus soli* children born abroad of citizens are aliens in respect to the state of which their parents are citizens, though according to the *jus sanguinis* they would be citizens; and, conversely, those born

[1] Stoicesco, "Étude sur la Nationalité," p. 286; Morse, "Citizenship," pp. 12, 15; Webster, "Law of Citizenship," p. 50.

[2] Compare Munroe Smith, art. "Nationality," in Lalor's "Encyclopedia of Political Science," vol. II, p. 944. Coke, "Commentary on the Early Laws of England," observed that "there are three incidents to a subject born; first, that the parents be under the actual obedience of the king; second, that the place of his birth be within the king's dominions; and third, the time of his birth." Quoted by Lawrence in his edition of Wheaton, p. 895.

[3] Civil Code, sec. 28.

[4] *Ibid.*, art. 4.

within the territory of a given state of alien parents are citizens according to the *jus soli* rule, but aliens according to the *jus sanguinis*. The result is numerous conflicts and cases of double nationality as between states which employ different rules.[1] England and the United States follow the doctrine of the *jus soli* with regard to the nationality of children born of alien parents within their territory, but that of the *jus sanguinis* as regards children born of their own citizens or subjects abroad.[2] France, on the contrary, follows the *jus sanguinis* rule for all purposes and treats as citizens children of French parents wherever born. Thus, a child born in the United States of French parents would, according to the law of the United States, be a citizen of the United States, *jure soli;* but according to French law it would be a citizen of France, *jure sanguinis*, thus giving rise to a case of double nationality. Conflicts of jurisdiction, however, are usually decided by the practice of states in declining to assert their claims in such cases so long as the citizen whose status is in dispute remains out-

Conflicts between the Two Principles

[1] "The occurrence of cases of double nationality acquired at birth is due mainly to the fundamental difference which exists between those countries whose law is derived mainly from feudal principles, and those countries whose law comes more directly from Roman sources, the former regarding the place of birth as the determining factor in constituting the relation of sovereign and subject, while the latter look to the nationality of the parent, and disregard, more or less, the place of birth. Although the statute law of most countries has introduced certain modifications of each of these principles, the difference springing from the original sources of the system of law still remains. To guard effectively against the occurrence of cases of double nationality would require the assimilation in this respect of all the various systems of law prevailing in civilized communities, an ideal which, however desirable, is not likely to be realized." Report of the United States Citizenship Commission, 1907, p. 345. On the subject of double nationality, see further Morse, "Citizenship," pp. 104, 157; Moore, "Digest," vol. III, pp. 518 ff.; Meili, "International Commercial and Civil Law," p. 120.

[2] Practically all states, even those which apply the *jus soli* rule within their limits, claim as their citizens children born abroad of their own citizens, that is to say, they recognize the *jus sanguinis* principle to a limited extent, but may and often do make such citizenship depend upon return to and residence within the country. In such cases the law not unfrequently declares that the child must upon reaching full age make a declaration of election or alienage.

Avoidance of Conflicts

side of their own jurisdiction.[1] Furthermore, many states allow persons of double nationality residing within their limits the right to elect the nationality which they prefer on attaining their majority. Thus France, while claiming as citizens all children born of aliens within French territory, allows them to "decline" French citizenship the year following the attainment of their majority and assume the nationality of their fathers, by producing a certificate from the government of the state to which their fathers belong, showing that they have elected such nationality, and also a certificate showing that they have complied with any call that may have been made upon them for military service.[2] The law is the same in Belgium.[3]

Advantages and Disadvantages of each Rule

Each of these rules has its advantages and its disadvantages. Where the place of birth is the determining element, the fact of citizenship is easily proved; but in other respects the rule is illogical and unsatisfactory. By making one's status depend upon the place of birth, often a mere accidental circumstance, it not infrequently confers nationality under conditions that are absurd. Thus a person may be born of alien parents in a state in which the parents are merely visiting or in which they are temporarily sojourning with no intention of permanently residing there, yet under the operation of this rule, if strictly applied, the child becomes a citizen of that state. The doctrine of the *jus soli* is a relic of feudalism. It is true that it is a part of the English common law, but as only that part of the common law was introduced into the United States which was applicable to the peculiar situation of our ancestors, it may well be doubted whether an institution so

[1] Lawrence, "Principles of International Law," p. 192.

[2] Code Civil of France, sec. 4.

[3] Code Civil of Belgium, art. 9. In Denmark children born of foreigners may make a declaration of alienage in their nineteenth year, but they must produce proof that they possess citizenship in a foreign country. If they continue to reside in Denmark, the declaration of alienage will have no validity.

bound up with feudalism was ever suited to the conditions of this country.[1]

The *jus sanguinis* rule is free from these objections, but it lacks the advantage of easy proof, since the proof of parentage is sometimes attended with practical difficulty. Furthermore, under this rule, a person may, while residing in one state, retain his foreign nationality and perpetuate it indefinitely if the advantages of alienage seem to outweigh those of citizenship. On the whole, however, the rule seems to be the more logical, natural, and reasonable, and its wide adoption in practice has led it to be considered by some authorities as a part of the law of nations,[2] though erroneously so.[3]

III. THE AMERICAN AND ENGLISH RULE

As has been said, the doctrine of the *jus soli* was introduced into the United States as a part of the English common law, though on account of its feudal origin it is doubtful whether it was not more unsuited to the situation of our ancestors than the rule which determines nationality according to descent.

Early Doctrine in the United States

The constitution of the United States, as originally adopted, required citizenship of the United States as a qualification for membership in both Houses of Congress and also for the executive office, but it failed to enumerate the essential elements of national citizenship, thus leaving the whole matter an open question. The judicial and executive departments as well as the commentators, however, took the view that citizenship by birth was to be determined on the basis of the common law or *jus soli*

[1] Cf. Webster, "The Law of Citizenship," pp. vii and 50.

[2] See an opinion of Judge Morrow in the case of Wong Kim Ark, 71 Fed. Rep. 382; also the opinion of the United States Supreme Court in the Slaughter-House cases where the court spoke of the rule of the *jus sanguinis* as the "doctrine of the law of nations."

[3] Van Dyne, "Law of Citizenship," p. 3.

principle. This view was first laid down by Chief Justice Marshall in 1804,[1] and it was followed by the courts of New York State, by various Secretaries of State of the United States, and by the inferior courts of the United States.[2] The doctrine of the *jus soli* was finally incorporated into the constitution of the United States by the Fourteenth Amendment, adopted in 1868, which declares that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside." This provision is held to have been simply a reënactment of the common law rule, declaratory of the existing practice as to who were citizens.[3] There was some uncertainty at first as to the meaning of the phrase "subject to the jurisdiction thereof,"[4] but it is now understood to comprehend all persons born in the United States except children born of alien enemies in hostile occupation of the United States (since they would not be born under actual obedience) and the children of diplomatic representatives of foreign states. Children born in the United States of foreign consuls and of other foreign citizens or subjects residing or temporarily sojourning here are held to be natural-born citizens, since they are clearly subject to the jurisdiction of the United States. The specific point decided in the case in which the question of the status of chil-

The Fourteenth Amendment

[1] In the case of the *Charming Betsey*, 2 Cranch 64.

[2] The Supreme Court of New York in 1844 (Lynch *v.* Clark, 1 Sandf. Ch., p. 583) ruled that children born of alien parents, even though temporarily residing in the United States, were citizens of the United States, *i.e.*, the place of birth was the determining factor. See also the opinion of Secretary of State Marcy (1854), and that of Attorney General Bates in 1862, 10 Opinions Atty. Gen. 392.

[3] Van Dyne, "Citizenship of the United States," p. 7.

[4] See, *e.g.*, the erroneous dictum of Justice Miller in the Slaughter-House cases (16 Wall. 73) that the above phrase was intended to exclude from its operation not only the children born of diplomatic representatives in the United States, but also the children born of *consuls* and of *citizens* or subjects of foreign countries residing in the United States. Cf. Burgess, "Political Science and International Law," vol. I, pp. 221–223; also Moore's American Notes to Dicey's "Conflict of Laws," p. 201.

dren born here of domiciled aliens was definitely settled, was that a child born of Chinese parents in the United States was a citizen, though Chinese are incapable of being naturalized under the laws of the United States.[1] But Indians born within the limits of the United States of Indians who still maintain their tribal relations, although owing allegiance to the United States, were held not to have been born in the United States or subject to the jurisdiction thereof within the meaning of the Fourteenth Amendment any more than the children of foreign diplomatic representatives, and hence are not considered as citizens until they have been naturalized.[2]

Modification of the "Jus Soli" Rule in the United States

In the United States, as in England, however, the strict *jus soli* or common law rule has been modified so far as it relates to the status of children born abroad of persons who are themselves citizens or subjects. Thus by an act of Congress of 1855, still in force, it was declared that all children born out of the jurisdiction of the United States of fathers who are citizens should be considered citizens of the United States. But in order to prevent the right of citizenship in such cases from being transmitted indefinitely to persons who had never resided here the act provided that the rights of citizenship should not descend to children whose fathers had never maintained a residence in the United States.[3] A recent act of Congress, however, provides that children born abroad of American parents in order to receive the protection of the United States government, shall be required upon reaching the

[1] Wong Kim Ark (1898), 169 U.S. 649. See also the opinion of the Department of State that "birth in the United States irrespective of the nationality of the parents confers American citizenship. In view of the decisions of our federal courts there can be no doubt of the correctness of this principle." "Foreign Relations of the United States," 1901, p. 303.

[2] Elk *v.* Wilkins, 112 U.S. 99; McKay *v.* Campbell, 2 Sawyer, 119.

[3] U.S. Revised Statutes, sec. 1903. This provision has been interpreted as giving no right of inheriting nationality through women, and hence an illegitimate child born abroad to an American woman is not a citizen of the United States. (Moore's "Digest," vol. III, p. 285.)

age of eighteen years to record at an American consulate their intention of becoming residents and of remaining citizens of the United States.[1] It has been the uniform policy of the United States to protect such citizens until they have attained the age of twenty-one years, and to allow them upon reaching such age to elect whether they will remain American citizens or choose the nationality of the state in which they were born and reared. The new citizenship law of 1907, as stated above, requires a declaration of intention at the age of eighteen years — the period when liability to military service usually begins in Europe. Without such a declaration the United States government might be called on to protect from military conscription many persons who have no intention of residing in the United States or of performing the obligations of citizenship, but who, after shielding themselves from the performance of their duties to the government under which they reside by the ambiguity of their position accept the allegiance of the country of their birth.[2] But the United States will not protect its *jure sanguinis* citizens against the claims of the state in whose territory they were born if that state claims them as its citizens or subjects *jure soli*. Conversely, children of aliens born in the United States are not protected against the state to which their fathers belong if it claims them as citizens *jure sanguinis*. Likewise England, by a statute passed in the seventh year of Queen Anne's reign, adopted the *jus sanguinis* principle in respect to children born abroad of British subjects, it being provided that such persons should be deemed to be natural-born subjects. In the reign of George II the principle was further extended so as to include not only children born abroad of British fathers, but also those whose paternal grandfathers were born in his Majesty's dominions.

Practice of the United States Government

[1] Act of March 2, 1907, sec. 6.

[2] United States Citizenship Commission Report, p. 17.

Thus, both the United States and England, where the doctrine of the *jus soli* is recognized as a part of the common law, have adopted the principle of the *jus sanguinis* for determining the status of children born abroad of citizen fathers, thus combining the two rules, rather than following either alone. Accordingly, children born abroad of United States citizens are American citizens *jure sanguinis*, while children born in the United States of aliens are American citizens *jure soli*.

IV. CITIZENSHIP BY DIRECT GRANT OR CONFERMENT; NATURALIZATION

Meanings of the Term "Naturalization"

Citizenship may be acquired not only by birth within a place subject to the jurisdiction of the state or through inheritance from a citizen father, but also by formal grant of the state. This method is commonly called naturalization. In its broadest sense naturalization signifies the act of formally adopting a foreigner into the political body of the nation and of clothing him with the privileges of a native.[1] It is a gratuitous concession to an alien, is granted only upon certain prescribed conditions, and may be withheld upon grounds of public policy or for any reason which in the judgment of the state may seem wise or expedient. Naturalization in the wider sense includes the bestowal of citizenship on an alien in any manner whatever, whether through legitimation, adoption, the naturalization of the children through the naturalization of the parent, the naturalization of a woman through marriage to a citizen, naturalization through the purchase of real estate, through service in the army or navy or the civil service, through the operation of the law of domicile, or through annexation of foreign territory, etc. In a more restricted sense naturalization has reference to the granting of citizenship by a court or an administrative officer after the fulfillment by

[1] Minneapolis *v.* Raum, 12 U.S. App. 446, and Opinions of Atty. Gen., 1859, in the Ernst case.

the applicant of certain prescribed conditions. This is the meaning which popular usage in the United States and England attaches to the term.

In the United States the whole matter of the granting of citizenship to aliens rests with Congress.[1] Before 1790, when Congress first legislated on the subject, the several states passed laws prescribing conditions under which aliens might be naturalized within their respective jurisdictions, thus raising the question as to the force and validity of such laws. In 1817 the United States Supreme Court held that the power of Congress was exclusive, and this doctrine has been followed ever since.[2] "The power of Congress must necessarily be exclusive," argued Hamilton, "because if each state had power to prescribe a distinct rule there could not be a uniform rule as required by the constitution." [3]

Naturalization in the United States

The power to naturalize has been delegated by Congress to certain judicial tribunals. By the act of June 29, 1906, these are: the United States circuit and district courts, the Supreme Court of the District of Columbia, and all state and territorial courts of record having a seal, a clerk, and a jurisdiction in actions at law or equity in which the amount in controversy is *unlimited*.[4]

In Europe

In Belgium, the certificate is granted by the Minister of Justice, but only after an authorization by the two chambers, which consider each application in secret session.[5] In

[1] Constitution of the United States, art. I, sec. 8. For the status of the question during the revolutionary period, see the case of Inglis *v.* Trustees, 3 Pet. 99; also Moore's "Digest," sec. 376.

[2] Chirac *v.* Chirac, 2 Wheaton 259; Wong Kim Ark (163 U.S. 228). Between 1776 and 1790, Delaware, Maryland, South Carolina, and Virginia passed such laws and granted passports to their citizens to travel abroad (U.S. Citizenship Commission Report p. 8).

[3] "Federalist," No. 32.

[4] Sec. 3. Prior to 1906 inferior courts of limited jurisdiction were empowered to grant certificates of naturalization, but the abuses that resulted led to the restriction of the privilege to inferior courts having unlimited jurisdiction.

[5] Law of 1881, arts. 6–8.

Austria, France, Hungary, and Portugal, the power to naturalize belongs to the higher administrative authorities. In England it rests with one of the principal secretaries of state, who has the right to grant or withhold the certificate after examining evidence which must be furnished by the applicant regarding his residence and intention to reside therein, and no appeal may be taken from his decision.[1] In Switzerland, application is made to the federal council (the executive), which after a hearing authorizes the councils of the canton and the commune in which the applicant has taken up his residence to grant the certificate.[2] In Germany, naturalization is granted by the administrative authorities of the individual states, though imperial law prescribes the conditions.

Conditions prescribed in the United States

Concerning the qualifications for admission to citizenship, the practice of states differs widely. In the United States prior to 1868 only free white persons were capable of being naturalized. By the act of 1870, still in force, the privileges of naturalization were extended to "aliens of African nativity and to persons of African descent." Under the present law, therefore, only "white persons" and "persons of African descent" are embraced within the operation of the naturalization law.[3] Indians are excluded from the benefits of naturalization under the general laws, though they may be, and often have been, naturalized by special acts or by treaty. Chinese are excluded by act of Congress from being naturalized, though under the interpretation of the Fourteenth Amendment they may acquire American citizenship by birth in the United States. So Japanese, Burmese, and Hawaiians are excluded, since they are neither "white persons" nor "persons of African descent."[4] So are

[1] Prior to 1847 the only method of naturalization in Great Britain was by means of a special act of Parliament or by letters of denization from the crown. In Great Britain, as in the United States, special acts are still sometimes passed, though with increasing rarity.

[2] Law of 1903, arts. 2–3.

[3] U.S. Revised Statutes, sec. 2169.

[4] Van Dyne, "Citizenship," p. 57.

alien enemies, polygamists, and disbelievers in, or opponents of, organized government, or advocates of the assassination of public officers or members of organizations or bodies teaching such doctrines.[1] In the United States the applicant for naturalization must have "behaved as a person of good moral character," and must be "attached to the principles of the constitution and well disposed to the good order and happiness of the same." [2] By the recent act of 1906 he must also be able to read and speak the English language. Mexico excludes convicted pirates, slaveholders, incendiaries, counterfeiters of money, murderers, kidnappers, and robbers, and requires the applicant to have a business, trade, or profession or an income capable of supporting him. Peru has a similar requirement.[3] Hungary requires blameless character and evidence of visible means of support for the applicant and his family.[4] Norway requires security that the applicant and his family shall not become a public charge. Portugal and Sweden require evidence of ability to earn a livelihood, and Sweden in addition insists on the possession of good moral character. The Netherlands require the applicant to furnish proof that the laws of his country place no obstacle in the way of his naturalization by another state.[5] Germany requires the applicant to be capable of managing his own affairs, to have led an irreproachable life, and to possess ability to support himself and those dependent on him. Before a certificate of naturalization is granted, the authorities granting it must receive a report from the local authorities to the effect that the applicant has a residence of his own or some place of shelter.[6]

In Europe

Nearly all states require a period of residence as a condi-

[1] Act of June 29, 1906, secs. 4 and 7.

[2] For the judicial interpretation of these conditions see the U.S. Citizenship Commission Report, pp. 115–118; also Moore's "Digest," sec. 383.

[3] Law of 1886, secs. 11–16 and 21–22.

[4] Law of 1879, sec. 8.

[5] Law of 1892, art. 3.

[6] Law of 1870, sec. 8.

Residence Requirements

tion to naturalization. In Portugal, Bolivia, and Ecuador this period is one year, though in the case of aliens descended from Portuguese and in the case of foreigners who marry Portuguese women no specific period of residence is required. In Argentina, San Domingo, Switzerland, and Mexico the period required is two years, an exception being made by Mexico of aliens serving in the merchant marine. Only one year's residence is required in such cases. In Sweden, the period of residence required is three years, though a less time may be demanded if the applicant has distinguished himself by extraordinary skill in science or art, agriculture, mining, or other occupation, or if his naturalization would in other respects be of benefit to the kingdom.[1] Italy requires a residence of six years or service under the government for four years, but the residence requirement may be reduced to three years if the applicant is the husband of an Italian woman or has rendered important service to the state.[2] In the United States, Hungary, Great Britain, Japan, and the Netherlands, this period is five years; though in Great Britain the residence requirement is waived if the applicant has been in the service of the crown for that length of time, and in Japan it is not required if the wife of the applicant is a Japanese woman. In Argentina no specified period of residence is required where the alien has held public office in the state, served in the army or navy, introduced a new and useful invention, constructed a railroad, or married an Argentine woman.[3] In the United States a period of one year's residence suffices for aliens who have served in the army and been honorably discharged. In England the applicant must also declare his intention to reside in the kingdom and serve under the crown. In Austria and France a residence of ten years is required; and in the latter country the applicant must establish a domicile within three years after receiving the

[1] Regulations of 1858, sec. 2. [2] Law of 1906, art. 1.
[3] Law of June 26, 1889.

certificate, but this may be reduced to one year if he has served the state or displayed exceptional talents or has introduced into France any useful industry or invention.

Effect of Naturalization

The effect of naturalization according to the law of most states is to invest the alien with all the rights of a natural-born citizen or subject, though a few exceptions are sometimes made. Thus the British naturalization act declares that a naturalized subject shall be entitled to all political and other rights and privileges and be subject to all the obligations to which a natural-born Englishman is subject, except that when he is within the limits of the state of which he was formerly a subject he shall not be deemed a British subject unless he has ceased to be a subject of that state in pursuance of its laws or of a treaty stipulation. Thus a Russian or a Turkish subject naturalized in Great Britain without the consent of his government will be treated as a British subject everywhere except in Russia or Turkey. In those countries he will be treated as an alien to Great Britain and denied the protection of the British government, because those states do not recognize the right of their subjects to renounce their allegiance for a new one. The British Naturalization Commission of 1901 recommended that all differences between the status of a natural-born and a naturalized British subject should as far as possible be abolished. It is especially desirable, said the commission, that a naturalized alien should, like a natural-born British subject, remain a British subject everywhere and for all purposes unless, and until, he divests himself of, or loses his nationality in one of the ways provided by law.

English Distinction between Naturalization and Denization

British law and practice make a distinction between *naturalization* and *denization*, the former being granted in pursuance of an act of Parliament, the latter by a grant of the crown by letters patent. The right of denization is an ancient prerogative of the crown, and though preserved by the naturalization act of 1870, is very rarely resorted to. While naturalization places an alien in the same position

as if he were a natural-born subject, theoretically a denizen occupies a rather intermediate position between an alien and a natural-born subject and partakes of both characteristics.[1] But there is not much practical difference in effect. A denizen cannot, however, be a member of the Privy Council, or of either House of Parliament, or hold any office of trust, civil or military, or take a grant of lands from the crown.[2] Some states, notably Belgium and France, make a distinction between "grand" naturalization and "ordinary" naturalization. The former alone has the effect of placing an alien on a footing of *political* equality with a person of native birth. To acquire "grand" naturalization in Belgium, the applicant must be twenty years of age, must be married, or, if a widower, must have one or more children, or must have resided in Belgium at least ten years, which may be reduced to five years in case the applicant has married a Belgian woman. Grand naturalization cannot be granted to unmarried foreigners or childless widowers until they have reached the age of forty years and resided in Belgium fifteen years. "Ordinary" naturalization may be granted to aliens who have attained the age of twenty-one years and resided in Belgium five years.[3]

Continental Distinction between "Grand" and "Ordinary" Naturalization

In the United States the only distinction between a natural-born and a naturalized citizen is that contained in the national constitution, which restricts the offices of President and Vice President of the United States to natural-born citizens. In all other respects the two classes of citizens are on a footing of absolute civil and political equality, and they are protected equally and alike everywhere, in the country of origin as well as in other states. Until the middle of the nineteenth century, however, the rule was frequently laid down by American publicists and followed

Natural-born and Naturalized Citizens in the United States

[1] Cockburn, on "Nationality," p. 28.
[2] Westlake, "Private International Law," p. 327.
[3] Naturalization Law of 1881.

in practice by secretaries of state (notably by Webster and Everett) that a naturalized citizen was not entitled to the protection of the United States government in the country of his origin. If, therefore, an alien after becoming naturalized in the United States returned to his native country, the government of his adopted country would not intervene in his behalf against the claim of his native state to his services. James Buchanan, however, Secretary of State, in 1848, in an instruction to George Bancroft, then Minister to England, declared that the United States government would recognize no distinction between natural-born and naturalized citizens in respect to their right of protection. Again in 1859, after he had become President of the United States, he vigorously combated the doctrine that a naturalized citizen was not entitled to protection against the claims of his native state, and asserted that "our government is bound to protect the rights of naturalized citizens everywhere to the same extent as though they had drawn their first breath in this country." "We recognize no distinction," he said, "between our native and naturalized citizens."[1] This view has since been uniformly acted on by succeeding presidents, and indeed would seem to be obligatory on the executive, since the statutes expressly declare that all naturalized citizens of the United States while in foreign countries are entitled to and shall receive from this government the same protection of person and property which is accorded to natural-born citizens.[2] The European doctrine that a naturalized alien shall not be considered a citizen or subject in the country of his origin when the latter refuses to admit the right of expatriation is virtually the recognition of the existence of a dual allegiance. It rests on the theory that naturalization does not necessarily substitute a new nationality in the place of the old, but merely adds to it a new allegiance so that the

[1] Quoted in Moore, "American Diplomacy," p. 182.

[2] Revised Statutes, sec. 2000.

person naturalized becomes subject to a double allegiance, his status in any case depending on the place of his domicile.[1]

V. OTHER MODES OF ACQUIRING CITIZENSHIP

Through Purchase of Real Estate or Appointment to the Public Service

In addition to naturalization proper, citizenship may be acquired through other modes, such as marriage, legitimation, adoption, the purchase of real estate, long residence in the country, entrance into the public service of a state, and the political incorporation of foreign territory. Citizenship is acquired by legitimation where an illegitimate child of a citizen father and an alien mother is legitimized. In Mexico and Peru purchase of real estate by an alien operates *ipso facto* to confer citizenship on the purchaser. In Peru, all instruments for the transfer of land to aliens must contain an express renunciation of foreign citizenship by the purchaser. By Mexican law foreign purchasers of real estate in the republic are treated as citizens unless at the times of purchase they make an express declaration of intention to retain their original nationality. According to Brazilian law ten years' residence in the republic confers citizenship on an alien unless within a certain period he makes a declaration of alienage. Appointment of aliens to positions in the public service of some states, of which Austria and Norway are examples, has the effect of naturalizing the persons so appointed.[2]

Through Incorporation of Foreign Territory

Citizenship is conferred on large bodies of inhabitants in their collective capacity by the annexation of new territory, through purchase, gift, conquest, or other mode. By the public law of most states the inhabitants of territories acquired

[1] Compare Moore, "American Diplomacy," p. 192. "The doctrine of dual allegiance," says Professor Moore, "is, in a word, the precise test, the acceptance of which distinguishes those who reject the doctrine of voluntary expatriation from those who support it."

[2] The new citizenship law of the United States recognizes this as one of the modes by which American citizenship may be lost, though there is no express provision to the effect that an alien may acquire American citizenship in this way.

by cession or conquest take the nationality of the state under whose dominion they pass, subject usually to the provision that they may elect to retain their former nationality by removal or otherwise. While, however, the inhabitants of the territory transferred acquire a new allegiance and a new citizenship and incur new political obligations, their relations with one another are not changed. That is to say, the public law to which they are subject alone is changed, the private law being left as it was until superseded or modified by the new sovereign.[1] It was by annexation that the inhabitants of Florida, Louisiana, Texas, California, Alaska, and Hawaii became citizens of the United States. In the case of Louisiana, Florida, and Alaska the treaties of cession provided that the inhabitants of the ceded territory should be admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, though in the case of Alaska the uncivilized native tribes were excluded. As regards the inhabitants of Porto Rico and the Philippine Islands, the treaty of cession provided that their civil status should be determined by Congress. The treaty, therefore, did not itself confer upon them the status of citizenship, though as regards the inhabitants of Porto Rico the United States Supreme Court has held that they are not aliens in the sense in which the term is used in the immigration laws.[2] By acts of Congress for the government of Porto Rico and the Philippines the inhabitants have been declared to be citizens of their respective islands, but not citizens of the United States. This is the only

Citizenship in the United States Dependencies

[1] American Insurance Co. *v.* Canter, 1 Pet. 511. It is very unusual, says the U.S. Supreme Court, even in case of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The people change their allegiance, their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed. See also U.S *v.* Buchanan, 7 Pet. 511.

[2] Gonzales *v.* Williams (1904), 192 U.S. 1.

instance of the acquisition of foreign territory by the United States in which the inhabitants of the ceded territory were not promised or granted the rights of citizenship. Nevertheless, they are entitled to the fullest protection of the government of the United States, and passports are issued to them for their identification in foreign countries.

Not infrequently, as has been intimated, the right of the inhabitants of ceded territories to retain their original nationality under certain conditions is expressly recognized in the treaty of cession. Thus the treaty of peace between the United States and Mexico of 1848 contained a stipulation permitting Mexican citizens residing in the territory ceded to the United States to retain their Mexican nationality provided they should make a formal election thereof within a year from the date of the exchange of ratifications. In the event of failure to declare their intention within the period mentioned, they were to be considered as having elected to become citizens of the United States. Similarly, the treaty of peace between France and Germany in 1871 allowed native-born Frenchmen of Alsace-Lorraine to retain their French nationality by making a declaration of intention within a certain period and by removing their domiciles to France. A more recent instance of the kind is found in the treaty of Dec. 10, 1898, between the United States and Spain, which permitted Spanish subjects residing in the territory ceded to the United States to preserve their Spanish allegiance by making a declaration within a year from the exchange of ratifications, in default of which they were to be considered as having abandoned their old allegiance. The benefits of the provision, however, do not apply to the Filipino population, but only to the natives of the Spanish kingdom, including the Balearic and Canary Islands.[1] Other

[1] On the subject of collective naturalization by treaty, see Moore, "Digest," sec. 379; Morse, "Citizenship," p. 129; Van Dyne, "Citizenship," part II, ch. 4; U.S. Citizenship Report, pp. 155–158; and Boyd *v.* Thayer, 143 U.S. 135.

instances of collective naturalization are afforded by the various treaties and acts of Congress by which citizenship has been conferred on Indian tribes.[1]

VI. CITIZENSHIP IN A FEDERAL STATE

Provisions of the Fourteenth Amendment

The inhabitants of states in which the federal system of government prevails are usually clothed with a dual citizenship and allegiance; one, general or national, the other local. The constitution of the United States as originally adopted (Art. III, sec. 2) speaks both of citizens of the United States and of citizens of the several states, although it does not define either national or state citizenship or give any indication of what was then considered their constituent elements. The Fourteenth Amendment, adopted in 1868, cleared up the uncertainty by declaring that all persons born or naturalized in the United States, and subject to its jurisdiction, were citizens of the United States, and by further declaring that all such persons should be considered as citizens of the several states in which they were resident. As regards any persons, however, upon whom the citizenship of the United States has not been conferred, the states are free to withhold or grant their own citizenship under such conditions as they may see fit to prescribe. The Fourteenth Amendment merely incorporated into the constitution what Chief Justice Marshall had long before held to be the unwritten law and practice in regard to citizenship of the United States and of the states. In a noted case decided by him in 1832 he declared that "a citizen of the United States residing in any state of the union is a citizen of that state." [2]

Many of the state constitutions define "state" citizenship in similar terms, rather superfluously, it would seem, in view

[1] For a list of such treaties and acts of Congress, see the case of Elk *v.* Wilkins, 112 U.S. 94. See also a full collection in "Indian Affairs, Laws and Treaties," 2 vols., 1903.

[2] Gassies *v.* Ballon, 6 Pet. 61.

of the federal provision.[1] But the possession of United States citizenship alone does not necessarily make one a citizen of a particular state. An important element is necessary to convert the former into the latter, namely, residence within the state. As has been said, there is no constitutional reason why the states may not confer their own citizenship on other persons than United States citizens resident within their limits, and as a matter of fact a number of them have done so. Some of them have not only placed resident aliens on a footing of absolute civil equality with citizens of the United States residing within their jurisdictions, but have even granted full political privileges to such as have declared their intention of becoming citizens of the United States.[2] Likewise a state may provide for the forfeiture or renunciation of its citizenship by judicial condemnation or long residence abroad, without in any way affecting the national citizenship.[3] As a consequence, federal and state citizenship are not identical and

The States may confer their own Citizenship on Aliens

[1] In Virginia it is declared that all persons born in the state, all persons born in any other state of the Union, who may be or become residents of the state; all aliens naturalized under the laws of the United States who are or may become residents of the state; all persons who have obtained a right to citizenship under former laws; and all children, wherever born, whose father, or if he be dead, whose mother, shall be a citizen of the state at the time of the birth of such children, shall be deemed citizens of the state. Code (1904), by Pollard, sec. 39.

[2] Some courts, however, have denied the doctrine that there can be a citizen of a state who is not also a citizen of the United States, and hence that state citizenship can only be acquired through the acquisition of federal citizenship (Lanz *v.* Randall (1876), 4 Dill 428). In this case a United States Circuit Court of Appeals expressed the opinion that no state could make an alien a citizen of the state in any other mode than that provided by the naturalization laws of Congress. But generally the courts have held the contrary and with more reason. See, *e.g.*, In re Wehiltz (1863), 6 Wis. 443. As the right of suffrage within certain limits is determined by the several states, it follows that they may confer the right to vote for President and Vice President and for Representatives in Congress on those upon whom the United States has not conferred the rights of national citizenship. It is therefore something of an anomaly that the right which is popularly deemed the test of citizenship (the right to vote) may be exercised by persons who are not citizens. The courts of some of the states have, indeed, held that one may be an elector without even being a citizen of the state in which he votes.

[3] Talbot *v.* Jansen (1795), 3 Dall. 183; Prentice *v.* Brannan, 2 Blatch. 162.

Federal and State Citizenship not Coincident

coexistent, since there may obviously be a class of state citizens upon whom the United States government has not conferred the rights and privileges of national citizenship. It is hardly necessary to add that there is also a class of United States citizens who are not endowed with the citizenship of any state. Such, for example, are those resident in the territories, dependencies, and federal districts and also possibly some American citizens residing abroad. From this it follows that while state citizenship is in most cases obtained through the acquisition of federal citizenship, — that is, it is generally a consequence of the latter, — it is not necessarily so.

National Citizenship is Paramount

From the first, the courts of the United States have recognized the existence of two citizenships, perfectly distinct, and, from some viewpoints, wholly independent of each other. "It is quite clear," said the United States Supreme Court in the Slaughter-House cases, "that there is a citizenship of the United States and a citizenship of a state, which are distinct from each other and which depend upon different characteristics or circumstances in the individual." [1] The question as to which of these allegiances is paramount was long a source of constitutional controversy in the United States. For a long time the states rights school of political thinkers contended that citizenship of the United States was but the consequence of citizenship in some state, and the Supreme Court in the Dred Scott case inclined to the same view.[2] According to this view state citizenship was the source of federal citizenship; the former was primary, the latter secondary, and in case of conflict the allegiance of the citizen to his state was considered paramount. But the question was finally settled by the Civil War and the

[1] 16 Wall. 36, 73; cf. also Boyd *v.* Thayer, 143 U.S. 135. The dual allegiance of the citizen under the American federal system was recognized and its nature well stated by the U.S. Supreme Court in the case of Cruikshank (1875), 91 U.S. 542, 550.

[2] Burgess, "Political Science and Constitutional Law," vol. I, p. 219; John C. Calhoun, Works, vol. II, p. 242; Scott *v.* Sanford, 19 How. p. 393.

adoption of the Fourteenth Amendment. According to this amendment the old view was reversed and citizenship of the United States was made primary and original, and that of the state secondary and derivative. The former was made the chief source, and the latter the consequence.

In the United States the citizenship of a particular state may be relinquished by a mere change of residence without any further formality, and the citizenship of another state may be acquired by establishing a domicile therein, also without any legal formality. The statutes of several states make express provision to this effect.[1]

Interstate Rights of Citizenship

The constitution of the United States declares that the citizens of each state shall enjoy all the privileges and immunities of citizens of the several states, but it does not undertake to define those privileges and immunities. The Supreme Court of the United States has declined to specify what they are, preferring to decide each case as it arises, in the light of the particular circumstances.[2] Justice Washington, sitting in the United States Circuit Court, said, "We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign. What those fundamental principles are it would perhaps be more tedious than difficult to determine." [3]

[1] The statutes of several states also make express provision for a formal renunciation of citizenship. Thus Virginia, Kentucky, and Georgia provide for formal relinquishment of citizenship by declaration made in court, but in each case removal from the state must follow in order to make the renunciation valid.

[2] McCready *v.* Virginia. 92 U.S. 391. In this case the court held that the right of a state's own citizens to the enjoyment of its oyster fisheries was a privilege of state citizenship and could not be claimed by the citizens of other states as a right of general citizenship.

[3] Corfield *v.* Coryell, 4 Wash. U.S.C.C. Rep. 380.

Privileges and Immunities of Federal Citizenship

The constitution of the United States (Fourteenth Amendment) speaks also of the privileges and immunities of citizens of the United States and forbids the states from making or enforcing any laws which shall abridge those privileges and immunities, but, as is the case with state citizens, it does not undertake to specify them or indicate their nature. The United States Supreme Court, in the Slaughter-House cases, in interpreting this provision of the Fourteenth Amendment, held that it did not confer any new privileges or immunities on United States citizens, nor attempt to enumerate or define those already existing, but merely assumed that there were such privileges and immunities which belong of right to citizens as such and which shall not be abridged by state legislation. The court, however, took occasion to enumerate what it considered to be some of the most important rights of federal citizenship, among them being those mentioned in the Civil Rights Act of 1866; namely, the right to make and enforce contracts; to sue in the courts; to be parties and give evidence; to inherit, purchase, lease, hold, and convey real and personal property; and to have full and equal benefit of all laws and proceedings for the security of person and property.

Citizenship in the German Empire

In other federal states the relation between national and local citizenship is somewhat different from that in the United States. The constitution of the German Empire (art. 3) declares that there shall exist a common citizenship (*Indigenat*) for all Germany. It also recognizes the existence of a particular citizenship in each state and declares that the citizens or subjects (*Staatsbürger*, *Staatsangehörige*) of each shall be treated in every other state of the empire as natives and shall be admitted to all civil rights enjoyed by natives and upon the same conditions. Contrary to the rule prevailing in the United States, state citizenship in Germany is original and primary, while imperial citizenship is derivative and secondary: that is,

state citizenship is the source and imperial citizenship the consequence. Citizenship of a particular state carries with it *ipso jure* citizenship of the empire and is an essential condition of imperial citizenship, for the latter can be acquired only through the former. In the United States, as we have seen, one may possess national citizenship without possessing the citizenship of a state; but in Germany it is otherwise. No one can become a citizen of the Empire without first becoming a citizen of one of the individual states. There is no immediate naturalization by the empire as such; the power of conferring citizenship rests with the states, though imperial law prescribes, within certain limits, the conditions under which it may be granted. Imperial citizenship, therefore, is dependent upon the citizenship of some state and is lost with the loss of state citizenship. Contrary also to the principle prevailing in the United States, mere change of residence from one state of the empire to another does not of itself operate to divest one of the citizenship of the state from which the removal is made, nor invest with the citizenship of the state in which the new domicile is established. Citizenship in the former state is retained until the relationship has been dissolved by some legal act of the party in accordance with the formalities prescribed by the law of the state for renouncing citizenship. It is possible, therefore, for one to retain his citizenship in one state for an indefinite period and even for the period of his whole life, while residing in another state. In like manner, citizenship in another state is not acquired by merely establishing a domicile therein, but is granted by the administrative authorities by formal act only upon application of the party. In other words, a citizen of one German state becomes a citizen of another, not alone by the establishment of a residence, but by a formal transaction between himself and the state.[1] It is not necessary, according to German law, to relinquish the

Interstate Citizenship in Germany

[1] Compare Howard, "German Empire," pp. 144 ff.

citizenship of one state in order to become a citizen of another. Indeed, one may be a citizen of several or even of all the German states at the same time.

Citizenship in Switzerland

Swiss law, like that of the German Empire, makes citizenship in a canton an essential condition to, and the source of, citizenship of the confederation.[1] Federal legislation prescribes the conditions under which foreigners may be naturalized, but the act of naturalization is performed by the government of the canton in which the applicant is domiciled and in accordance with its own laws, though the authorization of the Federal Council is necessary.

VII. LOSS OF CITIZENSHIP

As citizenship may be acquired by various methods, so it may be lost in numerous ways. Women lose their citizenship by marriage to aliens. Under the laws of many states acceptance of service, civil, military, or naval, under a foreign government, without the permission of the government to which the appointee owes allegiance, involves a forfeiture of citizenship. By the laws of Bolivia and Portugal the acceptance of a decoration from a foreign government has the same effect. In some states, desertion from the military or naval service has the effect of denationalizing the deserter. In many states, particularly those of Latin America, citizenship may be lost by judicial condemnation for certain causes. In a few it may be lost by expulsion and in some by dismissal or "liberation."

Loss of Citizenship by Absence

By the law of many states long absence abroad operates to expatriate the absentee. Thus the law of Denmark, the Netherlands, and Sweden provides that ten years' consecutive absence, without a declaration of intention to the contrary, works expatriation, and by Danish law the declaration

[1] Constitution of the Confederation, art. 43. See also the act of June 25, 1903, relative to the naturalization of foreigners; also Blumer and Morel, "Handbuch des schweizerischen Bundesstaatsrechts," vol. I, p. 330.

must be repeated every two years. According to Hungarian law ten years' residence abroad without a commission from the government has the same effect, in the absence of a notice of intention to retain Hungarian nationality, or the performance of certain other acts indicating a desire to remain a Hungarian. The law of Belgium provides that settling in a foreign country without intention of returning shall have the same effect. According to French law the maintenance of a permanent establishment abroad was formerly considered evidence of intention on the part of the absentee to abandon his French nationality; but the practice now is to consider the absentee a Frenchman until he formally renounces his French nationality and assumes another. By German law ten years uninterrupted residence abroad operates to expatriate a German subject. But this period may be "interrupted" by registering with a consul or by procuring a passport. The period has been reduced to five years by treaty with some states, provided the absentee is naturalized abroad at the expiration of the five years.[1]

Practice as to Expatriation

By far the most common mode, however, by which citizenship may be lost is by the voluntary withdrawal of the citizen from the country of his origin and his naturalization in the state of his adoption. Regarding the right of the citizen or subject voluntarily to expatriate himself and take up a new allegiance without regard to the will of the state of which he is a member, the attitude of governments has differed widely in the past, though the tendency everywhere is now to recognize the privilege as an inherent right of every individual. Some, like Russia and Turkey, however, wholly deny the right and allow no subject to

[1] Some states make a distinction between suspension and loss of citizenship. Thus according to the law of Brazil, Chile, Ecuador, Norway, Peru, San Salvador, and Uruguay, one's citizenship may be suspended for physical or moral incapacity or for judicial condemnation for certain crimes. See Constitution of Brazil, art. 71; Constitution of Chile, art. 9; Constitution of Columbia, art. 17; Constitution of Ecuador, ch. II, sec. 2; Constitution of Norway, art. 51; Constitution of Peru, art. 40.

leave their territories without the express permission of the state; and in case a subject emigrates without such permission and renounces his allegiance, he will upon his return to the country of his origin be liable to arrest and punishment. Some states, like France, recognize the right of expatriation, provided there exists at the time of emigration no unperformed military service, otherwise naturalization by a foreign government will be considered void, and upon the return of the person so naturalized he will be liable to trial and punishment under the military laws. Some, like Switzerland, admit the right of expatriation, but do not recognize the legality of naturalization in a foreign country unless the person so naturalized makes an express and formal written renunciation of his original citizenship, in the country of origin and according to the forms prescribed by its laws, and also furnishes proof of his naturalization abroad. Others, like Venezuela, recognize the right of expatriation, but upon the return of the person so naturalized to his original country, he will be allowed to resume his original nationality without further formality. Japan excepts from the right of expatriation all males over seventeen years of age who have not performed their service in the army or navy in pursuance of the conscription law, and also those in the military and civil service who have not obtained permission to emigrate.[1] Most governments now freely admit the right of expatriation and consider the original nationality to be terminated at the moment when the act of naturalization by the foreign government has been completed.

The English Common Law Doctrine

The doctrine of the English common law was that of indefeasible allegiance, the *nemo potest exuere patriam* of the Roman law, that is, the subject could not of his own motion throw off his allegiance for another. Once an Englishman always an Englishman, was the rule stated in an aphorism, except that the old allegiance might be abandoned for a

[1] U.S. Citizenship Report, p. 444.

new one with the consent of the sovereign. Without such consent, naturalization by a foreign government had no effect upon the former nationality. The tendency of the early jurists and commentators in the United States was to hold that the English common law rule of indefeasible allegiance prevailed in this country, and hence no American citizen could renounce his allegiance without the permission of the government. This was the opinion of Chancellor Kent and of many of the early American publicists, with the notable exception of Jefferson, who vigorously supported the right of voluntary expatriation.[1] Judge Story, in a celebrated case, laid down the rule that no individual could by act of his own and without the consent of his government put off his allegiance and become an alien, and this doctrine was generally approved by the courts and commentators.[2]

Early American Opinion and Practice

The opinions of the executive department varied at first more widely, but as time passed the right of expatriation came to be recognized almost without dissent. James Buchanan, in 1845, then Secretary of State, first asserted it to be an unqualified right of the citizen or subject; and several years later, in a dispatch to George Bancroft, Minister to England, he instructed him to resist the British doctrine of perpetual allegiance and maintain the American principle that natural-born subjects of Great Britain who should become naturalized under the laws of the United States were as much American citizens and entitled to the same degree of protection as though they had been born in the United States.[3] For a while after Buchanan's retirement the executive department reverted to the earlier

[1] Jefferson's Works, vol. IV, p. 37.

[2] See also 2 Kent's Commentaries, p. 49; Wharton, "Conflict of Laws," sec. 5; Lawrence's "Wheaton," 1 App. p. 918; Moore's "Digest," vol. III, secs. 431–433; Inglis *v.* Trustees of Sailors' Snug Harbor, 3 Pet. 99; Shanks *v.* Dupont, 3 Pet. 242; Talbot *v.* Jansen, 3 Dall. 133; Murray *v.* Schooner *Charming Betsey*, 2 Cranch 64.

[3] Moore's "Digest," vol. III, p. 566; also his "American Diplomacy," ch. VII.

Right of Expatriation recognized in the United States and England

doctrine; but both Marcy and Cass as Secretaries of State reasserted the unqualified right of expatriation; and finally Congress, by an act passed in 1868, declared it to be an "inherent right of all people," and asserted that "any declaration, instruction, opinion, order, or decision . . . which denies, restricts, or impairs the right of expatriation" was "incompatible with the fundamental principles of this government." The act further declared that naturalized citizens of the United States should while abroad be entitled to the same protection that is accorded natural-born citizens and that it should be the duty of the President to use any means not amounting to war to enforce this view as against any government which should deprive any naturalized American of his liberty contrary to this principle. This law is still in force.[1] Two years later Great Britain by an act of Parliament abandoned the doctrine of indelible allegiance and adopted the rule that any British subject, not under disability, and voluntarily naturalized in a foreign state, should cease to be a British subject.[2] This ended a long controversy between the two governments, concerning the refusal of Great Britain to recognize the legality of the acts by which British subjects were naturalized in the United States — a controversy which had been one of the chief causes of the War of 1812.

Denied by Turkey and Russia

Turkey and Russia, as has been stated, do not recognize the right of voluntary expatriation; and if a subject of either state becomes naturalized abroad without the permission of his government, such naturalization is treated as having no effect. Many states of Europe, while willing to naturalize aliens of Ottoman nationality and protect them in other countries equally with native-born subjects, nevertheless refuse to grant them protection whenever they return to Turkey. Some, however, like France, Belgium,

[1] Revised Statutes of the United States, secs. 1999–2001.

[2] Act of May 14, 1870. For a discussion of the English doctrine at present, see Phillimore, "International Law," vol. IV, p. 195.

and Holland, refuse to naturalize Ottoman subjects unless they are able to produce a permit from the Turkish government authorizing their naturalization. The United States stands practically alone in claiming for its naturalized citizens of Turkish origin the same right when they return to Turkey that they enjoy in other countries.

Repatriation

Most states make provision by which the original citizenship of a subject who has become naturalized abroad may be resumed. Such an act is referred to variously as reversion of nationality, repatriation, and redintegration. According to Belgian and French law, resumption of citizenship may take place by returning home and making a formal declaration of intention to reside there, and by establishing a domicile. Italian, Spanish, and Portuguese law requires substantially the same action. According to British law an Englishman naturalized abroad may be readmitted to the status of a British subject by the same process that is required of any other alien; but while in the limits of the foreign state of which he was previously a subject he will be treated as an alien unless he has ceased to be a subject of such state according to its laws governing expatriation. United States law makes no provision in regard to the repatriation of an American citizen who has been naturalized abroad, except in the case of women married to aliens; but the opinion seems to be that it can be accomplished only in the mode prescribed for the naturalization of other aliens.

VIII. WHAT CONSTITUTES EXPATRIATION?

Practice of the American Department of State

According to the practice of many European states, as we have said, a certain number of years of residence abroad, whether followed by naturalization in the adopted state or not, operates to expatriate the absentee; but the practice of the United States government has been to treat continued absence from the country only as a presumption of

intention to abandon its nationality. Indeed, as Secretary Fish said, in 1873, "continuous absence from this country does not necessarily presume expatriation," since there may always be the purpose of returning. "A citizen of the United States," said Secretary Evarts, in 1879, "may be absent from this country for an indefinite period for purposes of education, of business, or of pleasure, and so long as he does no act or assumes no obligation inconsistent with his native or acquired citizenship in this country he is not held under our laws to have forfeited any of his rights as a citizen of the United States." The question of the loss of citizenship is determined largely by the intent of the party, which intention is to be inferred from his acts and all the surrounding circumstances of the case. It is not to be determined by mere lapse of time or term of residence abroad, however extended in duration.

Act of March 2, 1907

The recent act of March 2, 1907, relative to the expatriation of citizens and their protection abroad, represents the first attempt to define by legislative act what acts shall operate to expatriate an American citizen. This law enacts, first, that any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws or when he has taken an oath of allegiance to any foreign state; and, second, that when any naturalized citizen shall have resided for two years in the state of his origin, or five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen . . . *provided, however*, that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, and provided also that no American citizen shall be allowed to expatriate himself when the United States is at war.[1] Under this act an American citizen

[1] Sec. 2. Sec. 15 of the naturalization act of June 29, 1906, declares that if any naturalized citizen shall within five years after naturalization take permanent residence in any foreign country it shall be considered *prima facie* evidence of intent to

may still reside abroad indefinitely as before, though after two years' residence in the country of origin or five years in another country the abandonment of his American nationality will be presumed and the burden of proving an intention to the contrary will rest upon him.

IX. THE STATUS OF ALIENS [1]

Classes of Aliens

Aliens are of two classes: first, those who have established a residence in the state, who are designated as resident or domiciled aliens; and second, those who are mere temporary sojourners. Again, they may be subjects of a friendly power, in which case they are styled alien friends; or they may be the subjects of a hostile state, in which case they are described as alien enemies. Although in a political sense aliens are members of other states, legally, they are fully subject to the jurisdiction of the state in which they are domiciled or in which they are sojourning; unless, as is the case with diplomatic representatives, they are exempt from the local jurisdiction by treaty stipulation or the law of nations. They are held to owe the state in which they are domiciled a local and temporary allegiance, which continues during their residence and for the violation of which they are liable to prosecution for treason equally with a citizen.[2] Aliens must obey the laws of the state in which they are domiciled or suffer punishment equally with citizens. And they must also share in

abandon his citizenship and in the absence of countervailing evidence his naturalization certificate may be canceled. The constitution of Mexico, art. 10, declares that the naturalization of an alien is rendered void by two years' residence in the country of his birth except with the permission of the government; that is, the two years' residence is not merely presumption of abandonment of the new citizenship, but is absolutely conclusive.

[1] For an excellent brief discussion of the rights of aliens, see Bonfils, "Manuel de Droit international public," secs. 441–454; see also Meili, "International Commercial and Civil Law," secs. 41 ff.; Webster, "Law of Citizenship," pp. 289 ff.; Wise, "Citizenship," pp. 267 ff.; Moore, "Digest," vol. IV, secs. 534–558; "English and American Encyclopedia of Law," vol. II, art. "Aliens."

[2] Carlisle *v.* U.S., 16 Wall. 147 (1872).

Liability to Conscription in the Military Service

the public burdens equally with citizens. The settled opinion seems to be that they are not liable to conscription into the military service, though the British government admitted, during the American Civil War, when complaint was made that British subjects were being forced to serve in the Virginia and Missouri militia, that "there was no rule or principle of international law which prohibits the government of any country from requiring aliens resident within its territories to serve in the militia or police of the country, or to contribute to the support of such establishment." [1] During the Civil War all aliens who had held office or exercised the right to vote at a state election were held to be liable to conscription in the national forces and the act of Congress of March 3, 1863, declared that the levy should include "all persons of foreign birth who shall have declared on oath their intention to become citizens." [2] Upon the suggestion of the British government that a distinction ought to be made between declarants who had exercised any political franchise and those who had not, and that the latter should be allowed a reasonable period to withdraw from the United States if they so elected, the government allowed sixty-five days to such persons to leave the country. Thereupon the British government declined to intervene on behalf of those who neglected to avail themselves of the opportunity.[3] The law of Mexico declares that aliens shall be exempt from military service, and if domiciled within the state they are bound to perform police service when the security of property or the maintenance of local order requires it.[4]

Right to Protection

Among the rights which aliens are universally admitted to possess is that of protection in their persons and property. Most governments of Europe and America grant the same

[1] Moore's "Digest," vol. IV, p. 57. [2] 12 Statutes at Large 731.

[3] See Halleck's "International Law" (Baker's ed.), vol. I, p. 305.

[4] Law of 1886, art 37. As to the right to require aliens to aid in the local defense, see Bonfils, "Manuel de Droit international public," sec. 445.

measure of personal protection to aliens as to citizens, and in general make no distinction between them so far as the enjoyment of *civil* rights is concerned, though as regards *political* privileges they are usually subject to certain disabilities. If they suffer injury during times of riot, disorder, insurrection, or civil war, they are in the same position as citizens and can lay claim to no greater degree of protection than is accorded to natives. But it is now a settled principle of international law that the government to which they are for the time subject is liable for any injuries which they may sustain on account of attacks upon them because of their foreign nationality, if the local authorities fail to use reasonable diligence to prevent or punish such crimes. The United States government has uniformly refused to admit such a liability, but in a number of cases it has indemnified the injured parties or their heirs by a money compensation.[1] But the injured alien must first exhaust the judicial remedies before resorting to diplomatic interposition. In the United States both the federal and state courts are open to aliens on the same terms as to citizens, and as regards the right to sue in the federal courts residence in the United States is not necessary.[2] Some countries in their treatment of aliens make special discriminations against certain classes on account of their race, creed, or occupation. Russia, for example, has long discriminated against Jews in respect to holding property, engaging in certain occupations, and traveling or settling in the country.

Right to sue in the Courts

Discrimination against Aliens

Formerly aliens were subject to disabilities much more numerous and onerous than now. Such were the *droit d'aubaine* and the *droit de detraction*, according to which

Disabilities of Aliens

[1] This was done, for example, in the case of the anti-Spanish riots at New Orleans and Key West in 1851; the anti-Chinese riot at Rock Springs, Wyoming, in 1885; and the Italian lynchings at New Orleans in 1891. Moore's "Digest," secs. 1023–1026.

[2] Breedlove *v.* Nicolet, 7 Pet. 413. This privilege applies to foreign corporations as well as to natural persons.

the property of aliens escheated to the state in which they died, or was subject to partial confiscation. These disabilities were common to European law a century ago, but were never recognized as being in force in the United States, and in some of the early treaties with European countries stipulations were entered into for the abolition of the practice. At English common law an alien might take real property by purchase or grant, that is, by act of the parties, though not by descent, that is, by act of the law.[1] In the latter case the land could be held as against all parties but the state. But the disabilities of the common law in respect to the inheritance of land have been removed or modified by statute both in England and America. Thus the British naturalization act of 1870 declares that real and personal property of every description may be taken, acquired, and disposed of by an alien in the same manner in all respects as by a native-born British subject, and a title to real and personal property of every description may be derived through, from, or in succession to, an alien in the same manner in all respects as from or in succession to a native-born British subject.[2]

In England and the United States

In England an alien may now hold all forms of personal property except British ships,[3] though prior to 1844 he was disqualified from holding certain other descriptions of personal property. In the United States, where the ownership of property is within the control of the states except in the territories and in those portions of the country which are under the exclusive jurisdiction of the national government, the right of aliens in respect to the acquisition and holding of property depends, of course, upon the laws of the different states in which the lands are situate. Most of the states now permit aliens to acquire and own lands

[1] Justice Story in Fairfax's Devisee *v.* Hunter's Lessee, 7 Cranch 619. See list of cases on this point in the "English and American Encyclopedia of Law," art. "Aliens."

[2] Sec. 2. [3] *Ibid.*, sec. 14.

on an equal footing with citizens, though in a few, like Kansas and Idaho, the common law disability still remains. Many states distinguish in this respect between resident and non-resident aliens, excluding the latter from owning real estate. A few, like Alabama, however, permit non-resident and resident aliens alike to take lands by descent as well as by purchase. Under the laws of Delaware, Kentucky, New York, and Washington an alien who has declared his intention of becoming a citizen of the United States enjoys greater rights in respect to the holding of property than other aliens; and in some states, notably in Illinois and Idaho, aliens may be employed on public works, while others may not. With regard to the right of aliens to hold land in places subject to the exclusive jurisdiction of the national government, Congress has enacted that no alien or foreign corporation shall be allowed to acquire or hold land in the District of Columbia,[1] and that no alien who has not declared his intention to become a citizen of the United States may own lands in any of the territories unless the right is secured to him by treaty.[2]

Treaty Rights of Aliens

In some instances treaties have been entered into by which aliens are allowed to purchase and hold lands in the United States, and although under the reserved powers of the states the right of foreigners to acquire title to real estate is dependent upon the laws of the states, as has been said, the Supreme Court has held that the treaty right is paramount. Hence a state statute prohibiting aliens from holding lands is inoperative so far as it relates to the citizens or subjects of a foreign country who have been given the right by treaty.[3] The power of the national authorities thus to abridge by treaty the right of the states to prescribe the conditions of land tenure within their borders was early denied, but the Supreme Court of the United States has held that such treaty stipulations are clearly within the com-

[1] Act of March 3, 1887. [2] Act of March 2, 1897.

[3] Chirac *v.* Chirac, 2 Wheat. 249.

petence of the national government.[1] In short, the national government possesses the constitutional power to remove the disabilities of alienage with regard to the inheritance of real estate and, when it acts, all laws of the states in contravention thereto are inoperative and void. But it is doubtful whether the treaty-making power extends to such matters as the conferring upon aliens of equal privileges with citizens in the public schools of the states.[2] Nevertheless, it has recently been held that a statute of New York forbidding the employment of aliens on public works violates a treaty between the United States and the king of Italy, providing that resident Italians in the United States shall enjoy the same rights and privileges as citizens of the United States, and is therefore void. The Italian civil code expressly declares that aliens shall enjoy the same civil rights as citizens.[3] This is the tendency of modern legislation.

"Modern international law," says Professor Meili, "starts with the proposition that aliens are as much entitled to the rights of private law as are natives."[4] Some states, like Austria and France, follow the rule of reciprocity and accord to aliens in their territories the same civil rights as are accorded to their citizens or subjects in foreign states.[5] Some countries, of which Roumania is an example, absolutely forbid aliens to own landed property except in cities.[6]

[1] Hauenstein *v.* Lynham, 100 U.S. 483.

[2] These two questions were involved in the recent controversy with Japan with regard to privileges of Japanese subjects in the public schools of California. The Board of Education of the city of San Francisco passed an ordinance providing for the segregation of Japanese school children in a certain school, whereupon the Japanese government protested and laid claim to equal privileges with citizens. The Japanese government based its claim on the treaty of 1894, which stipulates for full liberty of travel and residence in the United States and full and perfect protection of person and property. See Hershey, "The Japanese School Question," in "Political Science Review," vol. I, p. 393.

[3] Art. 3.

[4] "International Commercial and Civil Law," trans. by Kuhn, sec. 41; see also Bonfils, *op. cit.*, sec. 449.

[5] French Civil Code, art. 11; Civil Code of Austria, sec. 33.

[6] Constitution, art. 7.

Political Disabilities

For the enjoyment of political or public rights, alienage generally disqualifies. Thus in Great Britain, where foreigners are on a footing of equality with citizens so far as civil rights are concerned, they are ineligible to public office and are disqualified from exercising any parliamentary, municipal, or other franchise.[1] In the United States an alien cannot be a master of a vessel registered under the navigation laws. Citizenship is required by the federal constitution for membership in both Houses of Congress, and for the office of President and Vice President, though there seems to be no statutory requirement in this respect with regard to other offices. Aliens who have declared their intention of becoming citizens of the United States are allowed to vote at state and national elections in a number of states, and as a consequence may probably hold office.[2]

Right of Expulsion

It is hardly necessary to add that the undoubted right which every state has to determine for itself who shall live within its borders carries with it the right, in the absence of treaty stipulations to the contrary, to expel from its territories aliens whose presence is considered detrimental to the public interest, and to refuse admission for the same reason or admit upon such conditions as it may see fit to prescribe. This follows as a logical consequence of the sovereignty of the state. In ancient times, says Bonfils, collective expulsion of aliens was frequently resorted to, though in modern times it has rarely been followed except in case of war.[3] Some writers, like Bluntschli, have denied the right of expulsion except in rare cases and under severe limita-

[1] Naturalization Act of 1870, sec. 14.

[2] For example, in the states of Arkansas, Indiana, Kansas, Missouri, Nebraska, South Dakota, Texas, Oregon, and Wisconsin.

[3] "Manuel de Droit international public," 1 sec. 442. See also Vattel, "Droit des Gens," bk. 2, secs. 94, 101; Phillimore, "International Law," vol. I, ch. 10, sec. 120; Moore's "Digest," vol. IV, sec. 550; Danut, "De l'Expulsion des Étrangers" (1902); Wise, "Citizenship," pp. 269 ff. The United States Supreme Court has affirmed the right of the government to exclude or expel aliens, as an inherent right of sovereignty and as essential to self-preservation. Nishimura Ekin *v.* U.S. (1892), 142 U.S. 659.

tions, but the practice of states has been otherwise. In the United States it cannot be done by administrative act except in time of war, though under the alien act in force from 1798 to 1800 the President was given the power to expel such aliens as he should deem to be dangerous to the peace and safety of the United States. In Europe and Latin America, however, expulsion by administrative order or decree is not uncommon.

The right of expulsion, however, as Calvo observes, is not without its limitations; and when resorted to by a government in an arbitrary manner and without sufficient cause, the state of which the foreigner is a citizen or subject may justly prefer a claim for what is unquestionably a violation of international law and may, if satisfaction is not given, intervene in behalf of the injured person.[1] This has been the attitude of the United States government whenever the rights of its own citizens have been involved. It has readily admitted the right of expulsion and has confined its action in such cases merely to the employment of its good offices in behalf of the person expelled, except where the act was clearly arbitrary and without just cause.[2]

[1] According to Hall ("International Law," p. 24), expulsion may be resorted to only in extreme cases and in the manner least injurious to the person affected. The government exercising the power must, when occasion demands, state the reason for expulsion before an international tribunal and, an insufficient reason or none being advanced, accept the consequences.

[2] For instances of such cases, see Moore's "Digest," sec. 551.

CHAPTER XII

THE CONSTITUTION OF THE STATE

Suggested Readings: AMOS, "Science of Politics," ch. 1; BORGEAUD, "Adoption and Amendment of Constitutions," chs. 1, 6; BOUTMY, "Constitutional Studies," pts. I and II; BRYCE, "Constitutions," in his "Studies in History and Jurisprudence" vol. I; BURGESS, "Political Science and Constitutional Law," vol. I, pt. II, bk. I, ch. 1; COOLEY, "Constitutional Limitations," chs. 1, 4; also his "Comparative Merits of Written and Unwritten Constitutions," in the "Harvard Law Review," vol. II; DEALEY, "Our State Constitutions"; DODD, "Modern Constitutions"; ESMEIN, "Droit constitutionnel," pt. II, ch. 7; FUNCK-BRENTANO, "La Politique," ch. 4; GARNER, "The Amendment of State Constitutions" in the "American Political Science Review," vol. I; JAMESON, "Constitutional Conventions," ch. 2; JELLINEK, "Recht des modernen Staates," bk. II, ch. 15; LOWELL, "The Government of England," vol. I, ch. 1; MAINE, "Popular Government," Essay No. IV; MCKECHNIE, "The State and the Individual," ch. 5; PRADIER-FODÉRÉ, "Principes généraux de Droit, de Politique, etc., ch. 8; SCHOULER, "Ideals of the Republic," ch. 6; STIMSON, "The American Constitution," ch. 1; also his "Federal and State Constitutions of the United States," ch. 1; TIEDEMAN, "The Unwritten Constitution," ch. 12; WILSON, "Constitutional Government in the United States," ch. 1; WOOLSEY, "Political Science," vol. I, sec. 176.

I. DEFINITIONS AND DISTINCTIONS

The Term "Constitution"

THE word "constitution" as a term of political science was first employed to designate certain laws or statutes issued by the English crown. Thus the famous statutes of Henry II concerning the relations between the king and clergy were styled the "Constitutions of Clarendon."[1] The term was also used in the second and third charters granted early in the seventeenth century to the Virginia company;[2] in William Penn's "Frame of Government for Pennsylva-

[1] Stubbs, "Select Charters," pp. 137–140.

[2] Preston's "Documents Illustrative of American History," p. 33

nia" in 1682; in Sidney's work on government written during the reign of Charles II; in the political works of James Harrington; and in various other places. Among the more immediate precursors of the modern written constitution may be mentioned: the charters granted to the English colonies in America; the celebrated "Agreement of the People," drawn up by Cromwell's soldiers in 1647; "The Instrument of Government" of the Protectorate, promulgated by Cromwell in 1653; "The Fundamental Orders" of the Colony of Connecticut (1639); and the various Declarations and Resolves drawn up by the American colonies prior to the Revolution.[1] In the latter part of the seventeenth century the term gradually came to signify the more fundamental laws and especially those which related to the organization of the government.[2] The modern use of the term was finally established when it was applied to the new instruments of government adopted by the American colonies after their separation from Great Britain in the latter part of the eighteenth century. Since then the term has had a definite and well-understood meaning, namely, the body of fundamental law, either written or customary, which has to do with the organization of the state.

Every State must have a Constitution

The historian Lecky speaks of the English constitution at the time of the Restoration of 1660 as "still unformed," as though there could be a stage in the development of the state when it was without a constitution. But every community entitled to the name of a state, as Schulze remarks, must have a constitution, *i.e.* a collection of norms by which the legal relations between magistracy and subjects is determined and in accordance with which the exercise of the power of the state is regulated. The state, in short, is unthinkable without a constitution of some kind.[3] It may,

[1] Compare Borgeaud, "Adoption and Amendment of Constitutions," ch. 1, also an article by the same author in the "Political Science Quarterly," vol. VII, pp. 614 ff. See also Bryce, "American Commonwealth," ch. 35.

[2] Compare Macy, "The English Constitution," p. 452.

[3] "Deutsches Staatsrecht," vol. I, p. 19.

of course, be rudimentary and imperfect, but its existence is an essential element of state organization.

The constitution may be considered as an *objective fact*, in which sense the term refers to the totality of the constituent elements which enter into the physical and political make-up of the state. In this sense the term is used somewhat as it is in natural science, as when we speak of the constitution of an animal or a plant, and hence includes the land and people as well as the political institutions of the state. Secondly, it may be considered as an *instrument of evidence*, that is, as a document or collection of documents in which is embodied a description of the fundamental political organization of the state. It is, says one writer, an expression or embodiment in technical language of certain formulas addressed to the citizens of the state.[1] The constitution as a written instrument and the constitution as an objective fact ought to harmonize, but owing to constantly changing conditions in society there is frequent variance between them.

The Constitution as an Objective Fact and as an Instrument of Evidence

A distinction is sometimes made between the *real* and the *formal* constitution, the one being the actual historical constitution which has evolved under the operation of political and social forces, and the constitution which in fact is administered and which the people obey,[2] the other being the constitution in theory, the lawyers' constitution, the actual legal instrument stripped of all its conventions and historical addenda. The former is the formal constitution modified, expanded, and adapted to new conditions by convention and extra-legal practices.

Popular usage, however, restricts the use of the term to that body of fundamental laws and principles according to which the state is objectively organized and its functions exercised rather than its physical frame-

[1] Jameson, "The Constitutional Convention," p. 66.

[2] Compare Mulford, "The Nation," p. 144; Brownson, "The American Republic," p. 218; and Hurd's "Law of Freedom and Bondage," vol. I, p. 296.

work. The term is sometimes used also to designate an ideal, an imaginary model of excellence, rather than something which has a real existence, as when we speak of the maxims, the spirit, or the theory of the constitution, meaning some supposed rule or principle to which in our judgment the constitution ought to conform.

Definitions of the Constitution

"By the constitution of a state," said Sir James McIntosh, "I mean the body of those written or unwritten fundamental laws which regulate the most important rights of the higher magistrates and the most essential privileges of the subjects."[1] "The term," said George Cornwall Lewis, "signifies the arrangement and distribution of the sovereign power in the community, or the form of the government."[2] Judge Cooley defined a constitution as "the fundamental law of the state, containing the principles upon which government is founded, regulating the division of the sovereign powers and directing to what persons each of these powers is to be confided and the manner in which it is to be exercised." "Perhaps an equally complete and accurate definition," he continued, "would be the body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised."[3] Charles Borgeaud, a high authority on the subject of constitutions as instruments of government, says: "A constitution is the fundamental law according to which the government of a state is organized and agreeably to which the relations of individuals or moral persons to the community are determined. It may be a written instrument, a precise text or series of texts enacted at a given time by a sovereign power; or it may be the more or less definite result of a series of legislative acts, ordinances, judicial decisions, precedents, and customs of diverse origin and of unequal value and importance."[4] "A

[1] "Law of Nature and of Nations," p. 65.

[2] "Use and Abuse of Political Terms," p. 20.

[3] "Constitutional Limitations" (7th ed.), p. 4.

[4] "The Origin of Written Constitutions," "Political Science Quarterly," vol. VII, p. 613. For a slightly different definition by the same author, see his "Adoption and

constitution in the American sense of the word," said Mr. Justice Miller, "is a written instrument by which the fundamental powers of government are established, limited, and defined, and by which those powers are distributed among several departments for their more safe and useful exercise for the benefit of the body politic." [1]

II. CLASSIFICATION OF CONSTITUTIONS

Considered with reference to the degree of popular participation in the government which they allow, constitutions have been classified by various writers as "free," "democratic," "aristocratic," etc. Considered as instruments of evidence, they have been classified, first, as cumulative or evolved; and second, as conventional or

Amendment of Constitutions," p. xv. Other definitions are the following: "A constitution is a fundamental law or basis of government. It is established by the people in their original sovereign capacity to promote their own happiness and permanently to secure their rights of property, independence, and common welfare." — Justice Story. "The constitution of a state or nation consists of those of its rules or laws which determine the form of its government and the respective rights and duties of it toward its citizens and of the citizens toward the government." — James Bryce, "American Commonwealth," p. 350. "The constitution of a government is the body or collection of rules and principles in accordance with which the powers of that government are exercised; and a constitutional government is one the powers of which are exercised in accordance with rules and principles which are generally accepted as binding upon it and usually followed." — Emlin McClain, "Constitutional Law in the United States," p. 11. "Constitutions are the assemblage of those publicly acknowledged principles which are deemed fundamental to the government of a people. They refer either to the relation in which the citizen stands to the state at large, and, consequently, to the government or to the proper delineation of the various spheres of authority. They may be collected, written, and may have been pronounced at a certain date, such as the constitution of the United States; or the fundamental principles may be scattered, in acknowledged usages and precedents, in various charters, privileges, bills of rights, laws, decisions of courts, agreements between contending or otherwise different parties, etc., such as the constitution of Great Britain is." — Lieber, "Political Ethics," vol. I, p. 336. For other definitions see Lowell, , "Government of England," vol. I, p. 1; Paley, "Moral and Political Philosophy," p. 219; Moore, "Government of Australia," p. 75; Wood, "Government and State," ch. 5. For a definition by the United States Supreme Court, see the case of Van Horn *v.* Dorrance, 2 Dall. 304.

[1] Quoted by Morse in his "Citizenship by Birth and Naturalization," p. 165.

enacted.[1] To the first class belong those which have their origin mainly in custom, and which consist for the most part of accumulated usages, common law principles, decisions of courts, etc. They are the product of historical evolution and growth rather than of deliberate and formal enactment. They have no conscious starting point, are not "struck off" at a specific date, and they change by slow and gradual accretion rather than by formal legal processes. To the second class belong those which have been formally enacted by an assembly, or promulgated by some individual, usually a hereditary ruler, at a specific time, and the prescriptions of which are embodied in a written instrument. Enacted constitutions thus fall into two groups or classes: first, those which have their source in a royal grant; and, second, those which proceed from the people organized in constituent assembly.[2]

Distinction between Evolved and Enacted Constitutions

The distinction between evolved and enacted constitutions coincides roughly with the old and commonly observed distinction between unwritten and written constitutions. A so-called unwritten constitution is one in which most, but not all, of the prescriptions have never been reduced to writing; that is, they have not been proclaimed by a ruler or framed by an assembly at a particular time and embodied in a formal written instrument. It consists largely of a mass of customs, usages, and judicial decisions, together with a smaller body of statutory enactments of a fundamental character, usually bearing different dates. Constitutions of this class are not struck off at once by the hand of man; they are good illustrations of Sir James McIntosh's dictum that constitutions grow instead of being made.

[1] Jameson, "Constitutional Conventions," sec. 72; Lieber, "Civil Liberty and Self-government," p. 166; Ordronaux, "Constitutional Legislation," p. 207. See also Borgeaud, "Adoption and Amendment of Constitutions," p. 43; Lowell, "Government of England," vol. I, p. 4.

[2] This corresponds roughly to Borgeaud's classification as (1) compacts and royal charters and (2) popular constitutions. *Op. cit.*, p. 43.

Written and Unwritten Constitutions

A written constitution, on the contrary, is one in which most of the provisions are embodied in a formally enacted written instrument or instruments. It is a work of conscious art and the result of a deliberate effort to lay down once for all a body of coherent principles under which government shall be organized and conducted.[1] The distinction between a written and an unwritten constitution corresponds roughly to that between statute and common law, the *lex scripta* and the *lex non scripta* of the Romans. Some writers have, without doing violence to the facts, described the former as "statutory" constitutions and the latter as "common law" constitutions.

Generally, a written constitution is, as has been said, comprised within a single document bearing a single date, but there are examples of written constitutions composed of a series of instruments bearing different dates. Such are the "*Lois constitutionnelles*" of France, three in number; together with several amendments, which collectively make up the constitution of the French Republic. Similarly the constitution of Austria embraces five fundamental statutes, all, however, bearing the same date. They could

[1] "An unwritten constitution," says Jameson, "is made up largely of customs and judicial decisions, the former more or less evanescent and intangible since in a written form they exist only in the unofficial collections or commentaries of publicists or lawyers." *Op. cit.*, p. 76. "It is a record by more or less competent observers of fundamental changes which have occurred in the structure, principles, or guaranties of the constitution considered as a fact. These changes are not made, but work themselves out under the operation of determinate social and political forces. They do not evolve themselves *per saltum*, as in written constitutions, but gradually and continuously. They who transcribe such a constitution merely watch, pen in hand, the play of the producing forces and note results as they are achieved. These results become parts of the constitution as a fact, and the delineation of them, made by the observer, a part of the unwritten constitution considered as an instrument of evidence." *Ibid.*, sec. 78. Compare Bryce, "Flexible and Rigid Constitutions," p. 6, an essay originally published in his "Studies in History and Jurisprudence," vol. I, but subsequently reprinted by itself in a separate volume under the above title. See also an article entitled "Unwritten Constitutions in the United States," by Emlin McClain, "Harvard Law Review," vol. XV, pp. 531–540; and an article entitled "Written and Unwritten Constitutions in the United States," by the same author, in the "Columbia Law Review," vol. VI, pp. 69 ff.

as well have all been embraced within a single document.[1] Again, the constitution of Hungary consists of a long series of statutes and diplomas extending through a period of more than six and a half centuries (1222–1873).[2] Generally, a written constitution is an instrument of special sanctity, distinct in character from all other laws, proceeding from a different source, having a higher legal authority, and alterable by a procedure different from that required in amending an ordinary statute. It rests on the principle of separation between the constituent and lawmaking powers. In states having written constitutions there are thus two sets of lawmaking authorities and two bodies of law, one constitutional and paramount, the other statutory and subordinate. The latter, to be valid or "constitutional," must conform in its provisions to the former.

Written Constitutions framed by Legislative Bodies

The above-mentioned distinction, however, is not always found in states having written constitutions, though it is usual. There are a few examples of written constitutions which have not had their source in constituent assemblies, but have emanated from ordinary legislative bodies, and differ, therefore, from mere statutes, not in any legal sense, but only in the greater importance of the subject matter with which they deal. Thus the fundamental or constitutional laws of Austria and Hungary are nothing but statutes enacted by the parliaments of the two countries.[3] Similarly the Italian constitution (the *statuto*), though not a statute of parliament (having been granted by the king), is nevertheless on a legal plane with an ordinary statute and is probably alterable by the ordinary processes of legislation. So the constitution of Spain framed by a constituent Cortes contains no provision for its amendment, and

[1] Cf. Lowell, "Governments and Parties in Continental Europe," vol. II, p. 74.

[2] *Ibid.*, p. 128. The text of these constitutions, translated into English, with accompanying historical notes and select bibliographies are printed in Dodd's "Modern Constitutions," 2 vols. 1909.

[3] The fundamental laws of Austria, however, are not alterable as ordinary statutes. See Dodd, *op. cit.*, vol. I, p. 81, sec. 15.

can therefore probably be changed by the legislature as an ordinary statute, though as to this there is some doubt. In such states the constituent and legislative functions are not separate, and consequently a constitutional enactment has no superior legal force over a statute.

Constitutions granted by Kings and Princes

Not a few written constitutions have had their origin, as has been said, in the grants of ruling princes, made often under the pressure of necessity to prevent threatened revolt. Such a constitution or charter is generally in the nature of a compact or pledge, that the ruler granting it will govern according to certain principles set forth in its text. Sometimes it is stipulated in the constitution that it shall not be amended without the consent of the people; sometimes the prince reserves to himself the right of alteration. Examples of charters or constitutions of this type were those granted by various liberal princes of Germany to their subjects after 1815, beginning with Nassau and ending with Prussia in 1849, the latter of which is still in force; the constitutional charter granted to the French by Louis XVIII in 1814 and regranted in altered form by Louis Philippe in 1830; the constitutions granted by the king of Portugal in the early part of the nineteenth century; various constitutions granted by Napoleon to the states which fell under his dominion;[1] the present constitution of Italy, granted by Charles Albert to his Sardinian subjects in 1848, which became the fundamental law of Italy upon the establishment of the Italian kingdom, and the more recent constitutions of Japan, Russia, Turkey, and Persia.[2] Practically all the other written constitutions of

[1] For a list see Borgeaud, *op. cit.*, p. 32.

[2] The late Judge Cooley denied that such documents were true constitutions. Nothing short of a body of rules which is permanent in character and beyond the power of any ruler to set aside and whose source is the people, he declared, was entitled to be ranked as a constitution. The mere grant by a monarch, he said, of a constitution to the people, did not impart a constitutional character to the government so long as he retained the power to set it aside at his will. "Constitutional Limitations," 7th ed., p. 5, note 2.

the world have been framed by constituent bodies or legislative assemblies claiming constituent powers. From the point of view of their source or origin, then, we may classify constitutions as follows: (1) charters granted by sovereigns to their subjects; (2) constitutions framed by ordinary legislative assemblies; and (3) constitutions framed by constituent assemblies.

III. ANGLO-AMERICAN AND FRENCH TYPES CONTRASTED

The British Constitution

The best example of an unwritten constitution, so called, is that of Great Britain, "undoubtedly the first of all free constitutions in age, in importance, and in originality," says a brilliant French scholar — "a constitution which existed with all its main features four hundred years earlier than any other and one which has served more or less as the model for all existing constitutions."[1] In its nature it is, says Bryce, a "mass of precedents carried in men's minds or recorded in writing, dicta of lawyers or statesmen, customs, usages, understandings and beliefs, a number of statutes mixed up with customs and all covered over with a parasitic growth of legal decisions and political habits." Dicey speaks of it as a sort of maze in which the wanderer is perplexed by unreality, by antiquarianism, and by constitutionalism.[2] It is not a subtle contrivance of human art, nor the result of deliberate effort; it was never made in the sense in which most others were, but has grown up bit by bit and for the most part silently and without any acknowledged authority. "There was never any moment," observes Freeman, the historian, "when Englishmen drew out their political system in the shape of a formal document."[3] If it were stripped of its conventions and displayed

[1] Boutmy, "Constitutional Studies," 2d ed., p. 3.

[2] "The Law of the Constitution," 2d ed., p. 7.

[3] "Growth of the English Constitution," p. 22. "The English Constitution," says Boutmy (*op. cit.*, p. 27), is made up, first, of treaties or *quasi*-treaties such as the act of union, 1707, with Scotland and with Ireland in 1800 (these are "only the ad-

in its legal nakedness, it would be unrecognizable and infeasible. The unwritten part deals with the organization, privileges, reciprocal relations, and interaction of the great public powers, crown, cabinet, and parliament. "All those important matters," observes Boutmy, "which are the very center and soul of constitutional law are regulated in England by simple custom." The very name of the cabinet is unknown to the written law. The practice of annual sessions of Parliament, its division into two houses, the exclusive power of the House of Commons to initiate revenue bills, and many other matters of fundamental character are regulated wholly by custom. "In fact, the most important part of the political organization is just what is kept out of the written law and given over to the sole guardianship of custom." "The English" have, to quote Boutmy further, "left the different parts of their constitution where the waves of history have deposited them; they have not attempted to bring them together, to classify or complete them, or to make of it a consistent and coherent whole."[1] Many of the customs and usages which go to make up the constitution have, to be sure, been reduced to writing, and some of them have been embodied in fundamental statutes, but they have never been collected and incorporated in a single act. When

Boutmy on the English Constitution

denda to the constitution," "the external portion of it"); second, customs, generally known as the common law, the *lex non scripta* — in reality they are embodied in documents such as judgments, reports, legal opinions, etc; third, compacts enacted like statutes; fourth, statutes dealing with such matters as legal rights and securities, religious liberty, press, electoral privileges. According to Dicey the English constitution consists of (1) treaties, (2) the common law, (3) solemn agreements, like the Bill of Rights, (4) statutes. "Law of the Constitution," p. 48. Again, says Dicey, "the English constitution is made up of two parts; first, a body of rules, some written, others unwritten which the courts will take no notice of." The former he denominates collectively as the "law" of the constitution, the latter he styles "the conventions." For examples of each, see his "Law of the Constitution," pp. 24 ff. The English constitution, Dicey remarks, is a judge-made constitution, and bears on its face all the features good and bad of judge-made law. *Ibid.*, 211.

[1] *Ibid.*, p. 6.

it comes to constitution-making, the English have never shown the French taste for simplicity, logic, and uniformity. Indeed, they seem deliberately to have avoided as a dangerous experiment any attempts at unity, at laying down general principles, or at assimilation and fusion of the different parts of the constitution.[1] Those parts of the constitution which have been reduced to written form emanate from the same source, are enacted in the same way, have the same legal authority, and are repealed or amended in the same way, as other statutes. There is, in short, no separation in England between the constituent power and the legislative power; both are consolidated in the Parliament, which is at once legislature and constituent assembly. There is no law, fundamental or otherwise, which it cannot change.[2] But while the constitution-making and the law-making powers are in the same hands, there is a growing feeling that fundamental and far-reaching changes ought not to be made except as a result of a general election at which the proposed changes are the issues — in short, Parliament ought to alter the constitution only in obedience to a mandate from the electorate.[3]

No Distinction between the Constituent and Legislative Powers in England

Where the constituent and legislative powers are in the same hands, the distinction between a "constitutional" law and an ordinary statute cannot easily be determined. There is no exact juristic test, as in America, where constitutional provisions and statutory enactments proceed from different sources and are altered and repealed according to different processes. Whether a given act of the British Parliament, therefore, belongs to the category of constitutional law or that of ordinary statute law must depend, not on its source or manner of enactment, but

[1] Compare Boutmy, p. 13.

[2] See on this point Dicey, "Law of the Constitution," lect. II. The legal omnipotence of Parliament has already been fully discussed in the chapter on sovereignty.

[3] Compare Lowell, "Government of England," vol. I. p. 4.

upon the character of the act itself. If it is fundamental in its nature, that is, if it relates to the distribution or exercise of the sovereign power of the state, it may be classed as constitutional, otherwise it falls within the domain of ordinary statutory legislation. Obviously it is not always easy to draw the line between that which is fundamental and that which is not. We should have no difficulty, for example, in classifying as fundamental the great acts of Parliament known as Magna Charta, the Bill of Rights, the Habeas Corpus Act, the Petition of Right, the Act of Settlement, and possibly others; but we are not so certain as to such enactments as the Municipal Corporations Act of 1835, the suffrage and distribution acts of 1832, 1867, and 1884, and the local government acts of 1888 and 1894. In a technical sense De Tocqueville was correct, therefore, when he said the British constitution had no real existence.[1] He meant by this that there were no laws in Great Britain that could be definitely marked off from other laws, as fundamental, that is, there was no exact test for differentiating between a constitutional provision and a statute.[2] In America, where constitutional and statutory enactments proceed from different sources and are altered and repealed according to different processes, there is no difficulty in distinguishing between that which is constitutional in character and that which is statutory.

No Legal Distinction in England between a Statute and a Constitutional Enactment

In this connection it should be observed that "constitutional" and "unconstitutional" have different meanings in England and America. In England a law is "constitutional" because it is one which is supposed to affect the fundamental institutions of the state and not because it proceeds from a different source, has any higher legal

The Terms "Constitutional" and "Unconstitutional" in England and America

[1] "Democracy in America." Trans. by Reeves, vol. I, p. 103.

[2] This is the reason, says Bryce, why the British constitution has never been reduced to the form of a statutory enactment. Moreover, since any part might be changed by Parliament as easily as any other, little or nothing would be gained by it. It might be done, however, as has been done in Belgium, whose constitution is mainly a written reproduction of the English constitution.

authority, or is more difficult to change than other laws. An act of Parliament is sometimes said to be "unconstitutional," not because it is inconsistent with some higher law, for there is no law superior in authority to a statute of Parliament, but because it is supposed to be contrary to the established usages and customs of the kingdom or the principles of morality, international law, or the law of nature. The distinction is not between a legal and illegal statute as in America, for no act of Parliament can be "unconstitutional" in the sense of being illegal. An act of Parliament, for example, making a man a judge in his own case, an act to tax the colonies, an act to deprive a man of his property without due process of law, would be "unconstitutional" only in the sense of being in violation of ancient and well-established customs and not because of any inconsistency with some higher written law. No court would question such an act or refuse to give effect to its provisions, however immoral or unjust it might seem. In the United States, a statute is said to be "unconstitutional," not because it is one which does not affect in a fundamental manner the organization of the state or its institutions, but because it is not in conformity with the provisions of a higher written law. In the absence of such conformity the statute is said to be "unconstitutional," which is another name in America for illegality; and the courts exercise the authority of pronouncing upon the question of consistency and refusing to give effect to the inferior law when it is in conflict with the higher law.

The French Notion of a Constitution

We may contrast with the British constitution some of the earlier ones of France, which are the best representatives of the opposite theory that constitutions are made rather than evolved. The French idea of a constitution has been that of a written instrument, conceived and struck off at once, and capable of being fitted to the nation for which it is intended as a suit of clothes may be fitted to an individual. The French have never been impressed

with the advantage of following in old paths, constitutionally speaking, and of preserving continuity and connection with the past. They have oftentimes allowed themselves to be seduced by the fallacy that a nation may cut loose entirely from its past, and erect a new constitutional structure better adapted to the needs of the people than any which is the product of growth and evolution. The authors of the earlier French constitutions, observes Boutmy, were in the position of an architect about to erect a monument in the center of a public square; they must have a free and clear space at their disposal.[1] They went on the principle that no fabric based on history can occupy fully the ground, and that in the midst of the site to be covered there should be permitted to stand no part of the old edifice which may hamper the arrangement and complicate the plan of the new constitution. The French also attach great importance to the constitution as a philosophical instrument and a work of art and of logic. Order and symmetry have been the soul of their creations; they have done the work of logicians, engineers, and artists. Principles with them also occupy a very important place. Everything must be deduced from a principle and everything must conform to a principle. Having broken with the past and set aside all precedents, every important principle must be stated afresh. "There is a maxim," says Boutmy, "which has remained true under all the successive régimes in France, viz. that all rights must be recorded in writing; that no right can come into existence without a document to attest it, or be annulled without express abolition. There is no country where the feeling for customary law is more blunted than in France, or where the virtue of leaving things to be understood is less appreciated. Nor is there any country where there is a greater dislike to the idea of an equity (*droit prêtorien*) which, while preserving the form, changes the substance, of written law."[2]

[1] "Constitutional Studies," p. 167. [2] *Ibid.*, p. 168.

IV. WRITTEN AND UNWRITTEN CONSTITUTIONS

Classification of Constitutions as Written and Unwritten

The classification of constitutions as written and unwritten has been criticised on the ground that the distinction between them is really one of degree rather than of kind, and hence does not mark a contrast between widely differentiated types. In the first place, all written constitutions that have been in operation for any considerable period of time have in fact become overlaid with an unwritten element consisting of custom and judicial interpretation. Written constitutions, so called, Bryce remarks, become "developed by interpretation, fringed with decisions, and enlarged by custom so that after a time the letter of their texts no longer conveys their full effect." [1] The quantity of this conventional element in any case depends largely upon the age of the constitution and the character of the civilization. Examples of written constitutions which have become supplemented and modified by a more or less extensive unwritten element are those of the United States, Hungary, and Italy.

Written Constitutions contain an Unwritten Element

Much of the constitution of the United States, particularly those parts relating to the election, succession, tenure, and powers of the President, the procedure and methods of Congress, and the powers of the federal judiciary, has been modified in important particulars by the force of precedent, and expanded by judicial interpretation. We must take exception to the view of a well-known writer on American constitutional law, that the United States constitution "is peculiar in that it is all written, that it has nothing of tradition, that it is, indeed, in all respects, a statute of vast and solemn import enacted in the name of the people . . . an expression of legislative will in a written form." [2] We do not, however, go quite to the length of another high authority in holding that the conventional element in the United States constitution is now quite as large

[1] "Constitutions," p. 7.

[2] McClain, "Constitutional Law of the United States," p. 11.

as that in the English constitution,[1] but we deny that "it is all written" and has nothing of tradition or custom about it. It is true, of course, that the larger part of it is written, and that what is written is contained in a single document, but to hold that there is no conventional element intermixed with the written part is to close our eyes to some of the most obvious historical facts of our constitutional development.[2] The same is true of the constitutions of Hungary and Italy, and to a less extent of all written constitutions that have become venerable with age. As regards the constitution of Hungary, in particular, so much custom has grown up around it that some writers do not hesitate to put it in the same class with the British constitution.

Experience has demonstrated the impossibility of embodying all the principles of constitutional law in a written document. Even if it were possible to do so in the beginning, the constitution would soon become modified and expanded by growth and custom.[3] The conventional element is, therefore, inevitable and it is certainly not to be condemned. The French writer De Maistre has asserted that what is most intrinsically constitutional and fundamental never is or could be written without endangering the state. The weakness and fragility of any constitution, he asserts, are in direct proportion to the amount of the written element.[4]

On the other hand, all so-called unwritten constitutions contain a very large written element. Much of what was

[1] Wilson, "Congressional Government," p. 7. On this point, see also Bryce, "American Commonwealth," chs. 34–35.

[2] Compare on this point Brownson ("The American Republic," p. 218), who remarks that the United States constitution is twofold, written and unwritten — the constitution of the government and the constitution of the people. The former is simply a law ordained by the nation or people instituting and organizing the government; the latter is the real or actual constitution of the people as a state or sovereign community. The unwritten constitution is not made, but is born with the nation.

[3] Compare Lowell, "Government of England," Introduction.

[4] Quoted by Mulford in "The Nation," p. 144.

Unwritten Constitutions contain a Written Element

formerly custom and usage has been reduced to writing, and this tendency increases with time. A large part of the British constitution, as Sir Henry Maine has pointed out, is already written, particularly those parts which relate to the powers of the crown, the House of Lords, the judicial power, much of that which refers to the House of Commons and its relation to the electoral body.[1] And much of that which has been written is only declaratory of what was already law by force of custom. The great acts of Parliament, such as Magna Charta, observes Freeman, were not enactments of anything new, but merely set forth in written form what was already unwritten law.[2] It is true that the written element in the British constitution is smaller in quantity than the unwritten part, and that what is written is scattered through many documents bearing widely different dates; but it is nevertheless considerable in quantity and important in quality. The British constitution, therefore, differs from those of the written type not merely because it contains many conventions, but rather because its conventions are more abundant and all-pervasive than the parts which are written.[3]

The classification, therefore, of constitutions as written and unwritten is not only confusing and unscientific, but it results in placing in the category of written constitutions some which contain a large element of custom and convention, and in the category of unwritten constitutions others which to a large extent have been reduced to written form. Thus the constitutions of Hungary and Italy are both usually classified as written, when in reality they are so overlaid with custom and possess such a high degree of flexibility that they contain more elements of true resemblance to the British constitution than they do to the constitution of the United States.

[1] "Popular Government," p. 125.
[2] "Growth of the English Constitution," pp. 56, 57.
[3] Compare Lowell, "Government of England," vol. I, p. 9.

A Suggested Classification: Flexible and Rigid

It has been suggested that a more scientific and useful classification would be that of *flexible* and *rigid* constitutions, the test being the relation which the constitution bears to the ordinary laws, rather than its source or mode of enactment. Those which possess no higher legal authority than the ordinary laws and which may be altered in the same way as other laws, whether they are embodied in a single document or consist largely of conventions, should then be classified as flexible, movable, or elastic constitutions; while those which emanate from a different source, which legally stand over and above ordinary laws, and which are repealed or amended by different processes should be classed as rigid, stationary, or inelastic constitutions. The former, though they may be written, possess elasticity and may be altered with the same ease and facility as other laws; the latter cannot be thus altered, because their lines are hard and fixed. In the first class would fall the constitutions of Great Britain, Hungary, Italy, and possibly those of Prussia and Spain, though all except the first mentioned are usually classed as written instruments. In the second class would fall probably all the other so-called written constitutions of the world.[1]

Historical and a priori Constitutions

Sir Henry Maine classified constitutions, first, as *historical* or *evolutionary*, that is, those which have developed through the accumulation of experience; and, second, as *a priori*, or those "founded on speculative assumptions remote from experience."[2] The constitution of Great Britain is, of course, the best example of the former, while the

[1] Bryce suggests this classification as preferable to the older classification of constitutions as written and unwritten. See his Essay on "Flexible and Rigid Constitutions," p. 11. It is worth noting, however, that the distinction between flexible and rigid constitutions is not sharp or clear, hardly more so than that between written and unwritten ones. The German and Austrian constitutions, for example, are probably as flexible as that of Great Britain, yet are classed as rigid because the procedure of amendment in each case is slightly different from that of ordinary legislation.

[2] "Popular Government," p. 172.

eighteenth century constitutions of France were typical illustrations of the latter type. Resembling somewhat the latter class are those denominated by Judge Jameson as "ideal" constitutions, or those "framed in the closets according to abstract ideas of moral perfection for imaginary commonwealths." [1] Such were the constitutions proposed by Plato, Sir Thomas More, John Locke, Lord Bacon, and Thomas Harrington.

V. MERITS AND DEMERITS OF EACH TYPE

Advantages of Rigid Constitutions

Each of the two types of constitution described above has its elements of strength and of weakness. In favor of the enacted or written constitution are the advantages of certainty, definiteness, and stability. Its provisions being embodied in an instrument prepared ordinarily with great care and deliberation, the likelihood of uncertainty as to its meaning is obviously less than where its prescriptions consist of customs and usages. Such constitutions cannot be bent and twisted by the courts to mean what the demands of the moment may require, and hence the protection they afford and the rights they guarantee are apt to be more permanent and free from frequent and hasty change. The process of alteration being usually more difficult than is the case with ordinary laws, they are more stable and steady and free from the dangers of temporary popular passion. But the latter advantage often proves an element of weakness. Experience shows that the difficulty of amending rigid constitutions has often prevented the introduction of needed changes and thereby interfered with the healthful growth and progress of the state. Thus the temptation to violate such a constitution when it is outgrown and no longer suitable to existing conditions is powerfully accentuated. If, on the contrary, too easy

[1] "Constitutional Conventions," p. 67. See also Wood, "Government of the State," chs. 5–7, for a discussion of constitutions as *constrictive* and *restrictive*.

facility for producing amendments is provided, there is danger that constitutional changes may be made objects of party struggle for party purposes, and changes will be forced into the written instrument before they have wrought themselves into the constitution of the nation.[1] Disadvantages

In favor of the second group, that is, flexible constitutions, are the elements of elasticity and adaptability. Being alterable with the same ease and facility with which ordinary laws are changed, they are capable of being modified so as to make possible the adjustment of the constitution to new and changing conditions of the society. They insure a means of legal and orderly growth and development and are particularly adapted to the needs of a progressive state. This facility of alteration not only removes the temptation to disregard the constitution, but also affords a legal means of satisfying popular passion and of minimizing or preventing revolutions by meeting them halfway. In the life of every people there are crises when inelasticity becomes a danger — when the constitution must either be altered or violated. A flexible constitution is capable of being twisted to meet great emergencies where a rigid constitution would break under such circumstances. As Bryce has aptly remarked, "they can be stretched or bent so as to meet emergencies without breaking their framework; and when the emergency has passed, they slip back into their old form like a tree whose outer branches have been pulled aside to let a vehicle pass."[2] Such a constitution also recovers from shocks without injury where a written constitution would be injured past mending. No constitution which has not evolved from the history and experience of the people and been molded by the conventions of the national life can be completely adapted to the needs and thoughts of Advantages of Flexible Constitutions

[1] On this point see Jameson, "Constitutional Conventions," sec. 78. On the advantages of written constitutions, see also Lieber, "Political Ethics," vol. I, pp. 338–339.

[2] Essay on "Flexible and Rigid Constitutions," p. 22.

the people. Judge Cooley has well said that "of all the constitutions which may come into existence for the government of the people, the most excellent is obviously that which is the natural outgrowth of the national life, and which, having grown and expanded as the nation has matured, is likely at any particular time to express the prevailing sentiment regarding government and the accepted principles of civil and political liberty."[1] And the least valuable, he adds, is that which turns its back upon the national experience, dissevers the national future from the past, and lays the framework of the government in ideal perfection.

One of the weaknesses of a written constitution is that it too often represents an attempt to compress into a single document the principles of the political life and growth of the nation for an indefinite period of time. It is like an attempt to fit a garment to an individual without taking into consideration his future growth and changes in size. Most written constitutions in the past have been framed without regard to one of the most important principles in the life of the state, namely, that of growth and expansion. Gladstone once observed that no greater calamity could befall a people than to break utterly with their past. It was in this respect that the eighteenth century French constitutions proved unsuccessful. They were framed as if they were the starting point in the life of the state instead of a mere step, and as if they could be fitted to the nation as a strait-jacket to an individual. No historical constitution, says Maine, ever suffered their "ludicrous fate."[2] A state with such a constitution, observes this noted scholar, "is at best in the disagreeable position of a British traveler whom a hospitable Chinese entertainer has constrained to eat a dinner with chopsticks."

[1] "The Comparative Merits of Written and Prescriptive Constitutions," "Harvard Law Review," vol. II, p. 356. [2] "Popular Government," p. 175.

The Weaknesses of Unwritten Constitutions

But flexible constitutions, like those of the rigid type, have their elements of weakness. They are said to be unstable and with no guarantee of solidity and permanence. They are, says Bryce, in a state of perpetual flux, like the river of Heraclitus into which a man cannot step twice. They can be altered to meet the temporary fancies of the moment as an ordinary statute may, for they have no higher legal authority than other laws and are changed in no different manner. They have also been criticised as "the playthings of judicial tribunals" because in the "vast storehouse of literary matter out of which their provisions are to be gathered it is easy to find or not to find that which one will." [1] It is said also that they are unsuited to democracies, but have an affinity for aristocratic societies. The masses in a democracy are suspicious, if not hostile, to constitutional prescriptions which have not been formally enacted but which rest mainly upon custom and usage. There is a popular belief that unwritten constitutions allow a wider discretion to public officers than do those of the written type. The masses like, says Bryce, something plain, simple, and direct, and entertain a suspicion of the *arcana imperii* of which written constitutions are full.[2]

Judge Jameson, a high authority on the subject of constitutions, thus describes the relative merits of the two types which we have considered: "Considering the excellencies and defects of the two varieties of constitutions, it is not easy to strike a balance between them. For a community whose political training has been carried to a high degree of perfection, in my view, an unwritten constitution would,

[1] Jameson, "Constitutional Conventions," sec. 77.

[2] "Constitutions," p. 31. Bryce maintains that what he denominates as "flexible constitutions" are workable only under three conditions: first, supremacy must remain in the hands of a politically educated and politically upright minority; second, the bulk of the people must be continuously and not fitfully interested in and familiar with politics; and third, though legally supreme, they must remain content, while prescribing certain general principles, to let the trained minority manage the details of the business of government. *Ibid.*, p. 39.

on the whole, be preferable. In that training two elements would be of vital consequence to the safety of the system: first, an accurate understanding of their political rights and duties, general among the citizens; second, sleepless vigilance to detect violations of the constitution, and the utmost promptness and energy to resist and punish them. Without either of these elements, the usurpations of public functionaries must bring the system to speedy ruin. But for a community whose training has been imperfect or which is subject to fits of political apathy alternating with those of intense zeal for reform, a written constitution is doubtless the better one. While less flexible to the pressure of the national will, and therefore liable in many of its provisions to become obsolete and oppressive, it is a formidable barrier against usurpation. Its provisions are so plain that he who transgresses them must generally do so intentionally, and that fact must be so apparent that usurpation would in most cases not be ventured upon, as likely to arouse a dangerous opposition. The superiority of such a constitution in the circumstances supposed follows from the fact that immobility, with its train of possible evils, is less dangerous than movement that is ill-judged or unconstitutional."[1]

Spread of Written Constitutions

Whatever may be the merits and demerits of written and unwritten constitutions, it is clear that the popular preference is for the former. Strictly speaking, the British constitution is the only remaining example of the latter class. One after another of the states of Europe have followed America and adopted the written type, while Japan, Australia, Persia, Liberia, South Africa, and other countries outside of Europe and America have done likewise; and no state which has once tried the written constitution has ever returned to the unwritten type.

[1] "Constitutional Conventions," sec. 78.

VI. ESSENTIALS OF A WRITTEN CONSTITUTION

Constitutions and Statutes Compared

In its structure and content a written constitution differs in important particulars from a statute. It expresses the highest will of the sovereign and is or should be made up of very general prescriptions dealing with such matters as the structural organization of the government, the distribution of its powers among different organs, the mode and principles of its operation, the limitations upon its authority, the apparatus of checks and balances and the process by which the constitution itself may be altered. It is sometimes called the fundamental or organic law because it deals, or is supposed to deal, only with matters of a permanent and general character.[1] It is also frequently spoken of as the supreme or paramount law because it usually, though not always, possesses a higher legal authority and overrides all conflicting provisions of statute law. Statutory law is of secondary rather than of primary importance and deals with matters which have more of a temporary than a permanent character. A typical written constitution contains three sets of provisions: first, a series of prescriptions setting forth the fundamental, civil, and political rights of the citizens, and imposing certain limitations on the power of the government as a means of securing the enjoyment of those rights; second, a series of provisions outlining the organization of the government, enumerating its powers, laying down certain rules relative to its administration and defining the electorate; and, third, a provision or provisions pointing out the mode of procedure in accordance with which formal changes in the fundamental law may be

[1] "A written constitution," observes Borgeaud, "is essentially a law of political protection, a law of guarantees, guaranteeing the people against the government and the minority against the majority. It declares the rights of the citizens, determines the organization of different branches of government and their relations to each other, and in many cases makes certain and special provisions rendered necessary by peculiar political conditions." "Adoption and Amendment of Constitutions," p. 38.

Essential Provisions

brought about.[1] The first group of provisions collectively have been called by one writer the constitution of *liberty;* the second, the constitution of *government;* and the third, the constitution of *sovereignty.*[2] The first group is

Bills of Rights

commonly styled in republican states a "bill of rights" or "declaration of rights." The people of the United States have always attached great importance to these declarations and have considered them a necessary part of their constitutions.[3] Since 1780 every constitution adopted in the United States, with four exceptions, has given a prominent place to such declarations.[4] In France, likewise, for a time after the Revolution, declarations of principles were considered a most essential part of their instruments of government. The constitutions of 1791, 1793, 1795, and to a less extent that of 1848, contained not only elaborate declarations of the rights of the individual, but also numerous philosophical enunciations of the political doctrines and theories of the time.[5] The American declarations of

[1] Compare Moore, "Commonwealth of Australia," p. 75.

[2] Burgess, "Political Science and Constitutional Law," vol. I, p. 137.

[3] The absence of such a group of provisions in the national constitution formed, as is well known, one of the chief objections to the ratification of that instrument when it was submitted to the people of the states, though inasmuch as the national government is one of specifically enumerated powers, it would seem that the objection was without foundation. The first ten amendments adopted in 1791 removed the cause of the objection.

[4] The exceptions were the constitutions of Louisiana, 1812, 1845, 1852, and 1864, though in each there were a few scattering provisions in the nature of declarations relating to the rights of the individual. These declarations were originally intended to protect the people against arbitrary executive power, and since there is no longer any danger from this quarter, it has seemed strange to some foreign writers that they should continue to be repeated and multiplied in our constitutions. To such persons the reason appears to be simply the fondness of Americans for enumerating the maxims of political freedom and the principles of government. But if the danger from executive aggression has disappeared, that from legislative interference has greatly increased, and it is largely against this danger that the modern declarations are directed.

[5] For the texts of these declarations see Anderson's "Constitutions and Documents of France," pp. 58, 170, 212. The French constitutions of 1799, 1804, 1814, 1820, and 1852 contained no declarations in favor of the rights of man, nor does the present constitution of the French Republic.

rights, says Bryce, are historically the most interesting part of the constitutions, being as they are "the legitimate child and representative of Magna Charta and the English Bill of Rights."[1]

Provisions relating to the Organization of the Government

The second group of provisions, as has been said, relate to the organization of the government in its widest sense, including the distribution of powers among the several departments, the organization of the particular agencies through which the state manifests itself, the extent and duration of their authority, the modes of appointment or election of public functionaries, and the constitution of the electorate. In some constitutions the provisions of this character are few in number and very general in character. The "constitutional" laws of France, for example, contain no provisions governing the composition, mode of election, tenure, organization, or powers of the Chamber of Deputies, except the solitary provision that the Chamber shall be chosen by an electorate constituted on the basis of universal suffrage.

The constitution of the United States is in respect to its content and scope the model of written constitutions. Its provisions in regard to the frame of government are general in character, yet sufficiently detailed to embrace those matters which may be considered as essential and fundamental. It provides for the distribution of the powers of government between the legislative, executive, and judicial departments and the organization in a general way of each of the departments; it gives a brief and logical statement of their jurisdiction and powers; and a list of prohibitions upon both the national and state governments. It contains remarkably few miscellaneous provisions. There is nothing, or very little, relating to trade, industry, banks, and other corporations, railroads, schools, or the army or

[1] "The American Commonwealth," ch. 36. For further discussion of this subject see Sherger, "The Evolution of Modern Liberty," pts. III–IV, and Jellinek, "Declaration of the Rights of Man and the Citizen" (Eng. trans.).

the navy. Altogether it is a model of brevity, of logical and scientific arrangement, and of conciseness of statement; and it is worth noting that the language in which it is cast is remarkably free from redundant and ambiguous phrases. It deals only with matters which are fundamental, leaving those of a temporary or secondary interest to be regulated by statute. It is in truth the organic or fundamental law of the land.

The American State Constitutions

But it is the constitutions of the individual states of the American federal union that violate most the canons laid down above in regard to the proper conception of the content and scope of the fundamental law. The first of these instruments of government, notably those adopted before the close of the eighteenth century, were remarkably brief and general in character. But those of each generation have grown in volume until some of those more recently adopted contain not only the fundamental public law, but a great deal that is not fundamental as well as a considerable amount of parliamentary law and ordinary private law.[1] Recently there has been a marked disposition to set forth by way of enumeration the powers which may be exercised by the legislature and to describe the manner under which those powers shall be exercised;

[1] The Virginia constitution, for example, has grown from a document of a few pages to one of seventy-five; from an instrument of about fifteen hundred words to one of more than thirty thousand. The present constitution of Alabama contains about thirty-three thousand words; that of Louisiana, about forty-five thousand; that of Oklahoma, about fifty thousand. The Virginia constitution contains a lengthy article on the organization of counties; one on the government of cities, constituting a code almost as elaborate as a municipal corporations act; one on agriculture and immigration; one on corporations, containing fourteen sections; one on taxation and finance; etc. The constitution of Oklahoma contains an article of seven sections on federal relations, one of which deals with the liquor traffic; elaborate provisions regarding the referendum and the initiative; a section describing the seal of the state; a detailed enumeration of those who are permitted to accept railroad passes; an article on insurance; one on manufactures and commerce; and one on alien and corporate ownership of lands. It enumerates the powers of the legislature with so much detail that one almost wonders whether the legislature is not an authority of delegated rather than of residuary powers.

to multiply the prohibitions on the powers of the legislature; and to particularize with detail regarding the duties of public officers.

Changed Character of the State Constitution

The result of all this has been to change fundamentally the character of the American state constitutions. From instruments of fundamental public law they have become largely codes of ordinary statute law. The reason is twofold: In the first place, the change is due to the growth of a strong popular distrust of the legislature on account of frequent abuses of its authority in the past. The remedy for this has been sought in the imposition of constitutional restrictions on its power and the regulation through constitutional provisions of many matters which have hitherto been left to legislative control. In the second place, the rapidly changing economic and social conditions of the present day have produced a very complex society, giving rise to many new subjects, requiring constitutional regulation, that were unknown a hundred years ago. The growth of great cities, with the complex political, social, and economic problems to which urban life has given rise; the conditions of the modern industrial system; the growth of industrial combinations and great aggregations of capital; the development of new agencies of transportation and commerce, especially the railway and the telegraph,—have all given rise to conditions and problems of such deep and general interest as to create a demand for their regulation by constitutional provision rather than by ordinary statutory legislation. Moreover, the proper solution of the problems arising from the complexity of modern society requires more wisdom and knowledge than is usually found in legislative bodies, whose members are sometimes not only incompetent, but venal. The demand, therefore, for legislation through a constitutional convention is, as has been said, really a demand for legislation of a higher grade.[1] To the legislature, in consequence, is left little

[1] Compare Dealey, "Our State Constitutions," p. 1.

more than the power of filling up the details of the constitution and of regulating matters of minor importance. But the result has been to destroy to a large extent the distinction between the constitution and ordinary statutory legislation.

VII. DEVELOPMENT AND EXPANSION OF THE CONSTITUTION

It is an old saying, attributed both to Sir James McIntosh and Sir Henry Maine, that constitutions grow, instead of being made. Whatever may be the amount of truth contained in the saying, it is undeniably true that no existing constitution has reached its final form and become as it were a dead or fixed thing incapable of further development. Time and habit, said President Washington, in his farewell address, are at least as necessary to fix the true character of governments as of other human institutions. "Constitutions must grow," observed Lord Brougham, "if they are of any value; they have roots, they ripen, they endure." "Those that are fashioned," he continued, "resemble painted sticks, planted in the ground, as I have seen in other countries what are called trees of liberty. They strike no root, bear no fruit, swiftly decay, and ere long perish." [1]

How Constitutions Grow

Written constitutions grow in three ways: by usage, by judicial interpretation, and by formal amendment. The part played by custom and usage in the development of a constitution depends upon a variety of circumstances. It is more potent in the case of old than with new constitutions. It also plays a more important rôle in old and well-settled societies, where the inhabitants have greater veneration for the past and a higher regard for precedent than those of newer societies have.[2]

[1] "The British Constitution," Works, vol. XI, p. xxi.

[2] Compare Bryce, "American Commonwealth," ch. 32.

In the newer states of America, where constitutions are often revised or made over entirely at least once in every generation, development by usage is inconsiderable. The constitution of the United States, however, the oldest existing American constitution except that of Massachusetts, has developed and expanded in many directions through the operation of custom and usage. Many examples might be given if it were necessary. In all states the laying down of new rules and the inauguration of new practices tend to create a body of customary law which supplements and often modifies to some extent the actual working of the law as embodied in the written constitution. A constitution so free of detail and so concise of statement as that of the United States must necessarily be supplemented by legislation, judicial interpretation, or usage. Without understandings and conventions it would in fact be unworkable.

Expansion by Judicial Interpretation

The development of a written constitution by judicial interpretation necessarily results from the ambiguities of language and the deficiencies of expression which abound in the most carefully framed instrument, from the appearance of new circumstances and conditions, and finally from the inevitable difference of opinion which arises concerning the meaning of its provisions. Under such circumstances nothing is more natural than for the judiciary to assume the responsibility of ascertaining not only the true meaning of that which is expressed in the constitution but also that which the framers intended to express; and to draw conclusions respecting its applicability to subjects which lie beyond the direct expressions of the text and which the framers would have dealt with had they been gifted with the power of foresight.[1] Expansion by interpretation is especially

[1] The former act is known as "interpretation," the latter as "construction." See Cooley, "Constitutional Limitations," ch. 4; Bouvier's "Law Dictionary," *sub verbo* "Interpretation" and "Construction"; and Lieber "Practical and Legal Hermeneutics," ch. III.

potent in countries like the United States, where the judiciary plays an exceptionally important rôle, possessing as it does not only the power to interpret the meaning of the provisions of the constitution, but also to declare statutes which are in conflict with the supreme law to be of no force and effect. It is almost a commonplace to say that a very large part of the constitution of the United States consists of judicial addenda. Almost every clause has been the subject of interpretation and construction; and if we were to strip it of the meanings that have been added by the courts during its existence of more than a century, we should hardly be able to recognize it.

Expansion by Formal Amendment

The most prolific source of constitutional expansion, particularly in republican states, is, of course, formal amendment of the written instrument in accordance with the method of procedure set forth in the fundamental law itself for making changes in its provisions. As has been said, provision for its own alteration has come to be regarded as an essential part of every written constitution. Some of the early American state constitutions (eight of them altogether and all belonging to the eighteenth century) contained no such provisions.[1] Whether this omission was due to oversight, or failure to appreciate the obvious advantages of expressly pointing out in the constitution itself the mode of procedure to be observed in altering its provisions; or whether it was due to the prevailing opinion, repeatedly asserted in their bills of rights, that the people have an inalienable right at all times to amend their constitutions and hence no necessity exists for limiting their right by self-imposed restrictions,—there is a difference of opinion. Whatever may have been the reason, the desirability, not to say necessity, of pointing out in the constitution a method of legal and orderly procedure for

[1] For a detailed consideration of the methods of amending the American state constitutions, see an article by the writer entitled "The Amendment of State Constitutions," in the "American Political Science Review," vol. I, no. 2.

making alterations soon came to be appreciated; and all the American state constitutions framed since the beginning of the nineteenth century, with three exceptions, have contained amending provisions.[1] No written constitution is complete without such a provision. In some respects it is the most important part of the constitution, because, as has been said, upon the correspondence of the written constitution with the real and natural conditions of the state depends the question whether it shall develop with peaceable continuity or shall suffer alternations of stagnation, retrogression, and revolution.[2] John Stuart Mill has well observed that no constitution can expect to be permanent unless it guarantees progress as well as order.[3] Human societies grow and develop with the lapse of time, and unless provision is made for such constitutional readjustments as their internal development requires, they must stagnate or retrogress. In short, the written law must correspond with the economic, political, and social conditions of society. An unamendable constitution, says Mulford, is the "worst tyranny of time, or rather the very tyranny of time. It makes an earthly providence of a convention which has adjourned without day. It places the scepter over a free people in the hands of dead men and the only office left to the people is to build thrones out of the stones of their sepulchres." [4] The provision for amendment should be neither so rigid as to make needed changes practically impossible nor so flexible as to encourage frequent and unnecessary change and thereby lower the authority of

[1] The exceptions were those of Virginia, of 1830, 1851, and 1864.

[2] Cf. Burgess, "Political Science and Constitutional Law," vol. I, p. 137.

[3] "Representative Government," p. 8.

[4] "The Nation," p. 155. "To make amendment difficult or well-nigh impossible," continues Mulford, "and then to assume that it shall be exclusively and exhaustively definitive of the action of the people in all events, involves the denial of the organic and moral being of the people. . . . It is directly immoral, since in its necessary inference the people no longer exists as a power in the moral order which is the life of history."

The Nature of the Amending Power

the constitution by reducing it practically to the level of an ordinary statute. The machinery of amendment, remarks Judge Jameson, should be like a safety valve, so devised as neither to operate the machine with too great facility nor require, in order to set it in motion, an accumulation of force sufficient to explode it. In arranging it, due consideration should be given on the one hand to the requisites of growth and on the other hand to those of conservatism. "The letter of the constitution must neither be idolized as a sacred instrument with that mistaken conservatism which clings to its own worn-out garments until the body is ready to perish from cold, nor yet ought it to be made a plaything of politicians, to be tampered with and degraded to the level of an ordinary statute." [1]

[1] "Constitutional Conventions," p. 549.

CHAPTER XIII

THE DISTRIBUTION OF THE POWERS OF GOVERNMENT

Suggested Readings: AUCOC, "Droit administratif," pt. I, bk. I, ch. 1; BAGEHOT, "The English Constitution," ch. 2; BERTHÉLEMY, "Traité élementaire de Droit administratif," pp. 11–32; also his "Rôle du Pouvoir executif dans les Républiques modernes," pp. 51–57; BLUNTSCHLI, "Allgemeine Staatslehre," bk. VII, chs. 6 and 7; BONDY, "Separation of Governmental Powers" in the "Columbia University Studies in History, Economics, and Public Law," vol. V, chs. 1–7; CRANE and MOSES, "Politics," ch. 15; DUCROCQ, "Cours de Droit administratif," vol. I, pp. 6–50; DUGUIT, "La Séparation des Pouvoirs"; also his "Droit constitutionnel," secs. 54 and 55; ESMEIN, "Droit constitutionnel," tit II, ch. 3; "The Federalist," Nos. 47, 48, 49; GOODNOW, "Principles of Administrative Law," bk. I, chs. 1–4; JELLINEK, "Recht des modernen Staates," pp. 591–609; LAVELEYE, "Le Gouvernement dans la Démocratie," vol. I, bk. VII, ch. 1; LOCKE, "Two Treatises of Government," secs. 143–148, 156, 159; MILL, "Representative Government," ch. 5; MONTESQUIEU, "Esprit des Lois," bk. XI, ch. 6; MOREAU, "Précis élementaire de Droit constitutionnel," pp. 18–26; PRADIER-FODÉRÉ, "Précis de Droit administratif," pt. I., ch. 1; ST. GIRONS, "La Séparation des Pouvoirs," bk. I ch. 1; SCHOULER, "Ideals of the Republic," ch. 9; SIDGWICK "Elements of Politics," chs. 22, 24; STORY, "Commentaries," vol. I, bk. III, ch. 7.

I. THE THEORY OF THE SEPARATION OF POWERS

The Trinity Theory

THE functions or activities of government are customarily divided into three classes: those which are legislative in character, those which are executive, and those which are judicial. The legislative function consists mainly in laying down rules of conduct for those subject to the jurisdiction of the state; the executive function consists mainly, though not wholly, in enforcing such of these rules as are in the nature of commands; and the judicial function con-

sists in interpreting their meaning in order that they may be applied in particular cases.

Some writers, however, especially among the French, recognize only two classes or groups of governmental powers, namely, those which are concerned with the formulation and expression of the will of the state, and those which have to do with the execution of that will. Thus, says Du Crocq, an eminent writer on administrative law, "the mind can conceive of but two powers: that which makes the law and that which executes; there is no place for a third power by the side of the other two." [1]

Duality Theory

Those who adopt this view maintain that the judicial function does not in reality constitute a separate and distinct power, but is rather a part of the executive power, or a particular phase or incident of it, since it is primarily concerned with the application and enforcement of the legislative will. Thus writes Duguit, another French opponent of the trinity theory, "It necessarily follows that the judicial order is not a distinct power, but simply a dependency of the executive power, under whose surveillance it ought to be placed; . . . it is a mere agent of execution, subordinate to the executive power." [2] Consequently, what are popularly treated as three clearly differentiated sets of governmental functions are in fact but two, namely, those which are legislative and those which are executive.[3]

[1] "Traité de Droit administratif," vol. I, p. 29; see also his "Cours de Droit administratif," vol. I, p. 26.

[2] "La Séparation des Pouvoirs," pp. 73–74. See also his "Droit constitutionnel," pp. 319, 334, where he declares that there are but two powers of government: *la puissance législative et la puissance executive.* Duguit argues that if the judicial power is distinct, autonomous, and independent of the executive power, the right of pardon by the executive is evidence. In short, the existence of the right of pardon in the executive is a recognition of the dependence of the judicial power upon that of the executive.

[3] This is also the view of Pradier-Fodéré ("Précis de Droit administratif," cn. I), who asserts that "there can be but two powers of government, that which administers (legislative) and that which applies (executive)." See also Rousseau, "Contrat social," bk. III, ch. 7; also Treitschke ("Politik," vol. II, pp. 2–3), who

Separation of Powers in France

Generally the advocates of the "duality" theory subdivide the activities which have to do with the execution of the state will into three classes: those which are purely executive in character, or which are limited to the supervision and direction of the task of execution; those which are administrative in character, or which are concerned rather with the actual scientific or technical work involved in carrying on the executive functions of government; and those which are judicial, or which have to do with the interpretation and application of the law to concrete cases.[1] Finally, it should be noted that while most French writers conceive the judicial power to be a particular phase or manifestation of the executive power, they nevertheless separate rigidly the function of administration, in the executive sense of the term, from judicial administration, or the administration of justice, by taking away from the judiciary practically all power of control over the administrative authorities. In other words, the doctrine of the separation of powers, as Dicey remarks, has in the mind of a French statesman a meaning very different from that attributed to it by a statesman in England or the United States. In France it means not merely that

asserts that the "whole theory regarding the existence of three state powers and their separation from each other is a pure theoretical and fantastical conception." "It is better," he adds, "to recognize only two such powers: *Verfassung*, which embodies the totality of activities which have to do with the expression of the will of the state; and *Verwaltung*, which includes all those concerned with the execution of the state will." Compare also Goodnow ("Politics and Administration," especially chs. 1 and 2), who supports the French theory of the duality of governmental powers. All the powers of the state, he observes, have to do either with the expression of the will of the state or the execution of that will. Those activities which belong to the former class may be appropriately comprehended under the name "politics," while those belonging to the second category may be embraced under the term "administration." "Politics" and "administration," therefore, include all the activities of the state, whether we describe them as legislative, executive, judicial, administrative, or otherwise. See also St. Girons, "La Séparation des Pouvoirs," pp. 1–3; also pp. 135 and 411.

[1] Compare Goodnow, "Principles of Administrative Law," p. 17; and Jellinek, "Recht des mod. Staates," bk. III, ch. 18, sec. 2.

the judges should be independent as understood in the United States, but that the government and its agents ought to be independent of, and to a great extent free from, the jurisdiction of the ordinary courts.[1]

Criticism of the "Duality" Theory

While the "duality" theory is accepted by most French writers, there are a few of high standing who reject it as unsound. Esmein, for example, asserts that the function of the judges in the application of the law is not simply an incident of execution and hence is not subordinate to the executive power. It is true, he admits, that the function of interpretation by the judiciary is preliminary to that of execution; that is, the judges determine in the first place whether the law is applicable, and, therefore, whether it ought or ought not to be enforced in a particular case; but that does not make it a part of the act of execution. If the judicial power is only an incident of the executive power, then the judges are nothing more than the agents of the executive and render justice in its name. Moreover, since the exercise of judicial power in many cases has no bearing whatever on the execution of the law, how can it be a part or phase of the executive power in such cases? In the field of non-contentious jurisdiction, where no controversies are involved, there is no question of the execution of the law, and it would manifestly be incorrect to speak of the judicial power as having any agency in the function of execution.[2] But although much may be said in favor of the duality theory, popular usage and actual practice sanction the doctrine of the trinity of powers. In every modern state, whatever the form of its constitution, the governmental system is in fact organized and administered on the principle that the judicial power is not a part of the executive power, that it is fundamentally different in character, and that its exercise should be in-

[1] "Law of the Constitution," p. 181.

[2] "Droit constitutionnel," pp. 337–351. For further discussion of this question see Berthélemy, *op. cit.*, pp. 13–14.

trusted to separate and distinct organs. Even in absolute monarchies where, constitutionally, the whole legislative and judicial power is in the hands of a single individual, it is in practice separated and exercised through agencies largely distinct and independent of each other.

Ancient Recognition of the Trinity Theory

The idea of a threefold division of governmental powers was recognized by Aristotle, Cicero, Polybius, and other ancient political writers.[1] Aristotle, for example, classified the powers of government as: first, the *deliberative*, or those concerned with great questions of practical policy, including decisions regarding war and peace, the negotiation of treaties, the making of laws, etc; second, the *magisterial*, or those corresponding roughly to the executive functions of a modern state; and, third, the judicial power.[2] Although the ancient writers distinguished between three classes of governmental powers, corresponding roughly to the modern classification, yet in practice the distinction was not always observed. Thus the Ecclesia of Athens passed the laws, executed many of them, and exercised judicial functions. The Archons, although primarily administrative officials, possessed judicial powers. The Roman Senate was both a legislative and an administrative assembly, while the magistrates combined both administrative and judicial functions.[3] Throughout the Middle Ages no clear distinction between legislative, executive, and judicial functions was recognized, though in a rough way the functions, especially of legislation and administration,

[1] Compare, on this point, Bluntschli, "Allgemeine Staatslehre," bk. VII, ch. 6; Laveleye, "Le Gouvernement dans la Démocratie," vol. I, bk. VII, ch. 1; St. Girons, "La Séparation des Pouvoirs," pp. 4–29, where the theory and practice are reviewed at length; and Bondy, "The Separation of Governmental Powers," "Columbia University Studies in History, Economics, and Public Law," vol. V, p. 144.

[2] "Politics," bk. IV, ch. 14.

[3] Sidgwick observes that in the earliest times political functions were distributed among three differently constituted organs: the king or supreme chief, a council of subordinate chiefs or elders, and the assembly of fully qualified citizens. "Development of European Polity," p. 43.

were separated as a matter of convenience. Generally, the same magistrates exercised both executive and judicial functions. Indeed, the separation of the judicial power from the executive is a comparatively recent innovation, and when it came it undoubtedly marked an important political advance. The purity of justice and the liberty of the citizens, observes Bluntschli, gained by the change, and government did not lose its security.[1]

Development of the Principle of the Separation of Powers

The distinction is so familiar to us, says Maine, that it is hard for us to believe that even the different nature of the executive and legislative powers was not recognized until the fourteenth century, when it appeared in the "Defensor Pacis" of Marsiglio of Padua (1377).[2] Bodin, in the sixteenth century, was the first political writer to call attention to the danger of allowing the prince to administer justice in person and to point out the advantage of intrusting the judicial power to independent magistrates. "To be at once legislator and judge," he declared, "is to mingle together justice and the prerogative of mercy, adherence to the law and departure from it.[3] Writers on the law of nature and of nations had analyzed the nature of the various powers of government, but had generally held that in order that the state might be strong and powerful it was necessary that all powers should be united in the same hands rather than distributed among coördinate and coequal authorities. In England, at the time of the Puritan Revolution, in the middle of the seventeenth century, the division of governmental powers and their exercise by separate and distinct organs became for the first time a political doctrine. Cromwell, in the constitution of the Protectorate, went to the length of separating the executive and legislative functions, but he did not fully recognize the independence of the judiciary. John Locke, the political philosopher of the English Revolution, in his

[1] "Allgemeine Staatslehre," vol. I, bk. VII, ch. 7.

[2] "Popular Government," p. 219. [3] "De la République," bk. I, ch. 10.

famous "Two Treatises of Government," declared that the powers of government naturally divided themselves into those which were legislative in character, those which were executive, and those which were federative.[1] By the latter functions he seems to have meant what is now understood as the diplomatic power.

View of Montesquieu

The first modern political writer to dwell at length upon the separation of the powers of government and to treat it as a fundamental principle of political science was Montesquieu, in his famous work entitled "L'Esprit des Lois," published in 1748. "In every government," he said, "there are three sorts of power": the legislative, the executive, and the judiciary. When the legislative and executive powers are united in the same person, or in some body of magistrates, there can be no liberty. Again, there is no liberty if the judiciary power is not separated from the legislative and executive powers. Were it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined with the executive power, the judge might behave with violence and oppression. There would be an end of everything were the same man or the same body, whether of the nobles or of the people, to exercise these three powers, that of enacting the laws, that of executing the public resolutions, and that of trying the causes of individuals.[2] Montesquieu was the first writer, therefore, to make the theory of the separation of powers a doctrine of liberty. His views became a part of the political philosophy of the French Revolution and were fully enunciated in the constitutions which were framed in France before the close of the eighteenth century.[3]

[1] Ch. XII, secs. 143, 144, 146 (Morley's ed.).

[2] "Esprit des Lois," bk. XI, ch. 6.

[3] See, for example, the constitutions of 1791 and 1795. Article 16 of the Declaration of Rights of 1791 asserts that "every society in which the separation

View of Blackstone

In England essentially the same doctrine as that announced in France by Montesquieu was laid down by Blackstone in his "Commentaries on the Laws of England." [1] "Whenever," said Blackstone, "the right of making and enforcing the law is vested in the same man or the same body of men, there can be no public liberty. The magistrate may enact tyrannical laws and enact them in a tyrannical manner, since he is possessed, in his quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself." "Were the judicial power joined with the legislative," he concluded, "the life, liberty, and property of the subject would be in the hands of arbitrary judges whose decisions would be regulated by their opinions and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance of the legislative."

Views of the Founders of the American Republic

In America, at the time of the framing of the national constitution, the influence of both Blackstone and Montesquieu was powerful and decisive, and their doctrines con-

of powers is not determined has no constitution." In pursuance of this theory the constitution of 1791 created a legislative assembly not subject to dissolution by the executive; a ministry which was excluded from seats in the legislature; a king with no legislative initiative and with only a suspensive veto; and a judiciary elected by the people. The administrative authorities were freed from all control on the part of the judiciary and it was declared that "every act of the courts of justice which purports to oppose or arrest the administration shall be unconstitutional and void." In short, the principle was laid down that each of the departments of government was sovereign and independent within its domain; that the legislature should exercise all of the legislative power and only that; that the executive department should exercise all the executive power and no more; etc. Still, it recognized certain necessary exceptions, as where the administrative authorities were given certain powers of a judicial character. For the opinions of leading members of the National Assembly recognizing the doctrine of the separation of powers, see St. Girons, "La Séparation des Pouvoirs," pp. xxii–xxiii. See also Bluntschli, "Allgemeine Staatslehre," bk. VII, ch. 7, pp. 80–81; Duguit, "Droit constitutionnel," p. 323; and Rousseau, "Contrat social," bk. III, ch. 1.

[1] Chase's Edition, p. 17.

cerning the separation of powers became a part of the political creed of the early statesmen. Madison, in almost the very language of Montesquieu, whom he pronounced "the oracle who is always consulted and cited on this subject," defended the doctrine as essential to the protection of individual liberty. "The accumulation of all powers, legislative, executive, and judicial, in the same hands," he said, "whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." [1] George Washington, John Adams, Thomas Jefferson, Alexander Hamilton, and later Kent, Story, and Webster, all expressed similar views.[2]

Early Constitutional Provisions

In the early state constitutions framed before the close of the eighteenth century the idea that legislative, executive, and judicial functions must be kept separate, and intrusted to distinct authorities, was expressed in no uncertain language; and their governments were organized as nearly in accordance with the theory as considerations of expediency and efficiency permitted. Thus the constitution of Massachusetts (1780) declared that "in the government of this commonwealth the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative or judicial powers or either of them; the judicial shall never exercise the legislative and executive powers or either

[1] "The Federalist," No. 47.

[2] See Washington's Farewell Address; Hamilton, in "The Federalist" no. 47; Jefferson's "Notes on Virginia"; Kent, "Commentaries," vol. I, p. 283; Story, "Commentaries," vol. I, bk. III, ch. 8; Webster's Works, vol. IV, p. 122. "It is by balancing each of these three powers against the other two," said Adams, "that the efforts in human nature toward tyranny can alone be checked and restrained and any degree of freedom be preserved." "I agree," said Hamilton, "that there is no liberty if the power of judging be not separate from the legislative and executive powers." "The separation of the departments," said Webster, "so far as practicable, and the preservation of clear lines between them, is the fundamental idea in the creation of all our constitutions, and doubtless the continuance of regulated liberty depends on maintaining these boundaries."

of them, to the end that it may be a government of laws and not of men." Declarations similar in substance were incorporated in most of the other revolutionary state constitutions and in those which followed the adoption of the federal constitution.[1] Practically all of the state constitutions that have since been framed contain "distributing clauses" expressly providing for a tripartite division of governmental powers among separate and distinct departments or organs. The few that contain no formal distributing clauses nevertheless vest the legislative, executive, and judicial functions in separate organs, so that whether the theory is formally expressed or not, the government in every case is in fact organized in accordance with the principle of separation.

Doctrine of the United States Supreme Court

The present conception as well as the current practice in America has lately been expressed by the Supreme Court of the United States in the following language: "It is believed to be one of the chief merits of the American system of written constitutional law that all powers intrusted to the government, whether state or national, are divided into three grand departments, the executive, the legislative, and the judicial; that the function appropriated to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of the system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall, by the law of its creation, be limited to the powers appropriated

[1] For similar declarations in the other revolutionary state constitutions, see "The Federalist," no. 46; also Morey and Webster, "The First State Constitutions," in the "Annals of the American Academy of Political and Social Science," vols. IV and IX, respectively; and Bondy, "The Separation of Governmental Powers," p. 151.

to its own department, and no other." [1] In various foreign constitutions, particularly those which have been framed under the influence of American ideas, the theory is embodied in similar form.[2] In the states of Europe, where the cabinet system of government prevails, the close connection between the legislative and executive organs constitutes an important exception to the theory; yet, upon careful examination, the violation of the principle will be seen to be really less than it appears, since the functions of legislation and execution are in fact intrusted to separate organs, even though one is controlled by and is responsible to the other for the manner in which it exercises its powers. In none of them is the legislature really the executor of the law or the judge of the controversies raised in the course of its application; nor does the judiciary legislate or administer. The inconvenience and danger, however, of such a confusion of functions is admitted by European writers as well as by those in America.[3]

II. LIMITATIONS OF THE THEORY OF THE SEPARATION OF POWERS

The Theory Incapable of Strict Realization

When we assert it to be a fundamental principle of political science that the legislative, executive, and judicial functions of government should be intrusted to separate and independent organs or departments, we are to understand the proposition as being true only in a limited sense. Both reason and experience abundantly show that no government can be organized on the principle of the absolute and complete separation of the departments among which the legislative, executive, and judicial functions are distributed. There is not now and never has been a constitution in which the three departments were not more

[1] Kilbourne *v.* Thompson, 103 U.S., p. 188.

[2] For example, in those of Argentina, Australia, Brazil, Chile, and Mexico.

[3] Compare, for example, Esmein, "Droit constitutionnel," pp. 364–365; and Mill, "Representative Government," p. 83.

or less connected and dependent one upon the other, and in which each exercised powers that, under a strict application of the theory, did not belong more properly to one of the others. In short, the doctrine of the separation of powers has never been anything more than a theory and an ideal.

Locke's View

John Locke, the first political writer to attach great importance to the theory, while contending that legislative and executive powers should be vested in separate hands, recognized what is now generally admitted, that in practice the principle is incapable of full realization; "for," he said, "the legislature not being able to foresee and provide by-laws for all that may be useful to the community, the executor of the laws having the power in his hands, has by the common law nature a right to make use of it, for the good of society, in many cases where the municipal law has given no directions. Nay, many things there are which the law can by no means provide for; these must necessarily be left to the discretion of him that has the executive power in his hands." [1]

English Practice in Montesquieu's Time

Montesquieu, who, as has been said, made the principle of separation a doctrine of liberty and gave it an importance rarely attained by any political theory, obviously did not understand that it involved the absolute independence of each department of the others.[2] He must have known that the British constitution, of which he was writing when he laid down his famous proposition regarding the doctrine of the separation of powers, did not in fact recognize the doctrine

[1] "Two Treatises of Government," sec. 159. See also Goodnow, "Politics and Administration," pp. 11–12; also his Principles of Administrative Law," ch. 3; Bondy, "Separation of Governmental Powers," p. 117; Treitschke, "Politik," vol. II, p. 3; Jellinek, "Recht des mod. Staates," p. 589.

[2] Blackstone, who shared Montesquieu's enthusiasm for the theory of the separation of powers, did not overlook the advantage of an "occasional intermixture of legislative and executive functions." "It is highly necessary for preserving the balance of the constitution," he observed, "that the executive power should be a branch, though not the whole of the executive."

except in a qualified sense.[1] At that time, as now, the English executive was a committee of the legislature; one chamber of the legislature constituted an important part of the judiciary and at the same time "a great constitutional council of the executive"; and the judiciary was to a considerable extent subordinate to both the executive and the legislature, being appointed by the one and dependent on the other for its subsistence. The laws were often executed by authorities which at the same time administered justice, and some of the minor judicial authorities, notably the justices of the peace, were important administrative authorities.[2]

Montesquieu's Doctrine of Separation

When Montesquieu declared, therefore, that there could be no liberty where the executive and the judicial powers were united in the same hands, and where the executive was not separated from the legislative, he stated what the experience of England then and now contradicts. There is every reason for believing that Montesquieu did not mean to exclude each department from all control over the acts of the others or from all share or agency in their functions. This was the judgment of James Madison, who wrote at a time when Montesquieu's ideas were still fresh in the minds of political writers and when they were being defended by his American followers. "On the slightest view of the British constitution," observed Madison, "we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other." "From these facts, by which Montesquieu was guided," asserted Madison, "it may clearly be inferred, that in saying 'there can be no liberty where the legislative and executive powers are united in the same person or body

Madison's Interpretation

[1] Dicey, however, thinks that Montesquieu misunderstood the principles and practices of the English constitution, as his doctrine was in turn "misunderstood, exaggerated, and misapplied by the French statesmen of the Revolution." "Law of the Constitution," p. 187.

[2] Compare Goodnow, "Principles of Administrative Law," p. 25; Bondy, *op. cit.*, ch. 4; "The Federalist," No. 47; Maine, "Popular Government," pp. 219–220.

of magistrates,' or, 'if the power of judging be not separated from the legislative and executive powers,' he did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, where the whole power of one department is exercised by the hands which hold the whole power of another department, the fundamental principles of a free constitution are subverted. This would have been the case in the constitution examined by him, if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body had possessed the supreme judiciary or the supreme executive authority." [1]

Limitations of the Theory early Recognized

When the framers of the American constitution came to apply the theory in practice, they recognized the impracticability, not to say the undesirability, of absolute and complete separation. "If we look to the constitutions of the several states," said Madison, "we find, notwithstanding the emphatical and, in some instances, the unqualified terms in which the axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." Some of the distributing clauses, in fact, expressly recognized limitations upon the theory. Thus the constitution of New Hampshire (1776) qualified the principle by declaring that the "legislative, executive, and judiciary powers ought to be kept as separate from and independent of each other as the nature of a free government will admit; or as is consistent with the chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity." Madison himself, in defending the doctrine in its qualified form,

[1] "The Federalist," no. 46.

asserted that "unless the departments were so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires as essential to a free government can never in practice be duly maintained." He stated the principle in a very general way when he said that "the powers properly belonging to one department ought not to be directly and completely administered by either of the other departments; it is equally evident that neither of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers."[1] This was probably all that Locke, Montesquieu, and Blackstone intended the theory to mean, though it will readily be admitted that the principle as thus stated is so broad and elastic that it can have little value as a practical rule.

The True Principle stated by Madison

The strict separation of powers is not only impracticable as a working principle of government, but it is one not to be desired in practice. The experience of the English and other constitutions where the principle is not strictly observed shows that it is not a necessary condition of free institutions, and that there is no necessary danger to liberty in allowing the lawmaking body to execute or even to judge.[2]

John Stuart Mill pointed out that if each department of the government were completely independent in its sphere so that it could thwart the actions of the others, frequent deadlocks would be inevitable, since "each department acting in defense of its own powers would never lend its aid to the others; and the consequent loss in efficiency would outweigh all the possible advantages arising from the independence."[3] This danger was recognized by Black-

Absolute Independence of the Departments impracticable

[1] "The Federalist," No. 47. Compare also Jefferson's "Notes on Virginia," p. 195.

[2] Compare Crane and Moses, "Politics," p. 194.

[3] "Representative Government," p. 82; Compare also Duguit, "La Séparation des Pouvoirs," p. 1.

stone, who, while defending the principle of the separation of the departments, declared that their "total disjunction" would in the end produce the same tyrannical effects as their complete union in the same hands, "by causing that union against which it seems to provide." The different attributes of sovereignty, observes Esmein, cannot be exercised separately any more than the different powers of a human being; they coördinate naturally and necessarily in a common action which presupposes their coöperation.[1] The true way to prevent the encroachment of one department upon the domain of the others is, as Madison has aptly remarked, to permit each to participate in the functions of the others to such an extent as to check them and keep them in their proper places without, however, controlling them.[2]

The framers of the United States constitution, impressed as they were with the value of the principle of separation, did not delude themselves into supposing that any precise or exact delineation of the three spheres could be drawn, or that anything was to be gained by an absolute separation of authorities such as the French Revolu-

[1] "Droit constitutionnel," p. 369. Duguit points out that the separation of authorities or departments is often confused with the separation of functions. The greatest mistake of the French National Assembly of 1789, he says, was in trying to separate not only the functions of government but also the authorities (*pouvoirs*) by creating three separate entities and investing each with a part of sovereignty in violation of the principle of the unity of sovereignty. Neither Locke nor Montesquieu, Duguit declares, ever fell into such an error. Neither intended to establish a legal theory, but simply to show how the English constitution, by a distribution of functions and a certain collaboration of organs, had established guarantees of liberty. Montesquieu never used the expression "separation of powers," nor did he ever maintain that organs vested with the several functions of government should be absolutely independent of each other and without any control over one another. "Droit constitutionnel," p. 319.

[2] "The absolute independence of each department," observes Bluntschli, "contradicts the organic nature of the state. Each must in a certain sense be subordinate to the others, or the state would be torn to pieces, for "the head cannot be separated from the body and made equal to it without destroying the man." "Allgemeine Staatslehre," bk. VII. ch. 7.

tionists undertook to introduce. They had in mind only a general distribution and aimed merely at a rough classification. They did not trouble themselves to inquire whether a particular power was legislative, executive, or judicial in its nature, but were concerned rather with the question of which department was best fitted to exercise a given power.[1] It was with them a question of administrative convenience and administrative expediency rather than one of pure political philosophy. Certain powers were vested in the executive, not because they were necessarily executive in character, but because the organization and methods of the executive department were such that those powers could be better exercised by it than by the department to which they strictly belonged. Thus the power of issuing ordinances and of negotiating treaties was conferred upon the executive, since both are a species of legislation which experience and reason have clearly shown can be more efficiently performed by the executive department than by the legislative department, where, under a purely scientific interpretation of their nature, they more properly belong. Likewise it is desirable, if not necessary, that the courts be allowed a share in legislation through their power to interpret the written law and to declare what is the unwritten law. For the same reason many other exceptions to the theory of separation were introduced in the organization of the government.

The Test of whether an Act is Legislative, Executive, or Judicial

The legislative department was made a sort of depository for many classes of powers which are neither distinctly legislative, executive, nor judicial in character, but which partake of the characteristics of all three, and which were conferred upon the legislature through considerations of administrative convenience or political expediency.[2] Every act which proceeds from the legislature is therefore classed as legislative; every act performed by the executive

[1] Bondy, *op. cit.*, p. 297.

[2] Compare Cooley, "Principles of Constitutional Law," p. 44.

department is classed as executive; and so on, regardless of its real nature.[1]

The True Meaning of the Theory

While no department exercises all the power which upon a strict interpretation belongs to it, it nevertheless exercises the essential part of it. Each department exercises incidental rights of a nature intrinsically different from the mass of powers logically belonging to it, but they are such only as are necessary to enable it to perform efficiently its functions as an independent branch of the government and are in reality part of the principal power itself.[2] In practice, therefore, the theory has never been construed to mean that all the legislative power shall be exercised by the legislative department, or all the executive power by the executive department, or all the judicial power by the judicial department. The theory otherwise understood would be impossible of practical application in any governmental system.[3]

It is impossible to draw a strict line of demarcation between the several departments. There is a common borderland between them, within which each department must tolerate the others if government is to be efficient. No legislature can discharge entirely all those functions which under a strict interpretation of the theory are legis-

[1] Thus the granting of a divorce is regarded as legislative or judicial according as it is granted by the legislature or the courts. And so with the issue of a charter or an ordinance or the appointment of an officer, etc.

[2] Compare State *v.* Noble, 118 Indiana, p. 350.

[3] "The trouble with the theory," says Woodrow Wilson, "is that government is not a machine, but a living thing — no living thing can have its organs offset against each other as checks and live. On the contrary, its life is dependent on their quick coöperation, their ready response to the commands of instinct or intelligence, their amicable community of purpose. Government is not a body of blind forces; it is a body of men, with highly differentiated functions, no doubt, in our modern day of specialization, but with a common task and purpose. Their coöperation is indispensable, their warfare fatal. There can be no successful government without leadership or without the intimate, almost instinctive, coördination of the organs of life and action. This is not theory, but fact, and displays its force as fact, whatever theories may be thrown across its track. Living political constitutions must be Darwinian in structure and in practice." "Constitutional Government in the United States," p. 56.

lative. Details must be filled up and rules issued by the executive, governing the application of the law, if the government is to be conducted on practical lines. In short, functions may be separated, but not the departments themselves.[1]

Superiority of the Legislature

While the departments are, theoretically, equal and coördinate, they "constitute one brotherhood whose constant trust requires a mutual toleration of what seems to be a 'common because of vicinage' bordering on the domains of each." [2] In reality, however, the departments are not equal. In all governments the legislative department is in fact the most powerful of the three and the judiciary the weakest.[3] The powers of the legislative department in most governments are not specifically enumerated, but are general or residuary in character; in short, it is a sort of repository, as has been said, of all powers not conferred on the other departments. It possesses everywhere a large control over the organization and activities of the other departments, through its power of supply and its power to create public offices and to provide for their support. It not only makes the laws that are to be interpreted by the judiciary and enforced by the executive, but lays down the rules and conditions in accordance with which the executive acts. The legislature is thus, in a sense, the regulator of the administration.[4] The very nature of government is such that the will of the lawmaking power must, to a certain extent, be superior to the executive and the judiciary. This is necessarily so because the will of the state must be expressed before it can be interpreted and enforced, and in formulating that will the legislature may, as has been said,

[1] Compare Goodnow, "Politics and Administration," p. 14.

[2] Brown *v.* Turner, 70 N.C. 93.

[3] Cf. Story, "Commentaries," sec. 534. On the subordination of the executive to the legislature, see Berthélemy, *op. cit.*, bk. II, chs. 1–2.

[4] Cf. Goodnow, "Comparative Administrative Law," vol. I, p. 31; and Bluntschli, *op. cit.*, bk. VII, ch. 7.

prescribe the conditions and circumstances under which execution shall take place.

Weakness of the Judiciary

The judiciary, on the contrary, possesses no control over the source of supply or over the army or the governmental organization of the state. It cannot, as has been remarked by a distinguished commentator, lay taxes, nor appropriate money, nor command armies nor appoint officers. It has no means of influence through the power of patronage, no powers, in short, that can be wielded for itself.[1]

[1] Story, "Commentaries," sec. 542.

CHAPTER XIV

THE LEGISLATIVE DEPARTMENT

Suggested Readings: BENOIST, "La Crise de l'État moderne," chs. 3–5; BLUNTSCHLI, "Allgemeines Staatsrecht," bk. II, also his "Politik," bk. X, ch. 3; BORNHAK, "Allgemeine Staatslehre," pp. 94–133; BROUGHAM, "The British Constitution," Works, vol. XI, chs. 3–7; BURGESS, "Political Science and Constitutional Law," vol. II, bk. III, ch. 5; CRANE and MOSES, "Politics," ch. 13; DUGUIT, "Droit constitutionnel," secs. 52, 53, 56, 57, 106–122; also his "L'État, les Gouvernants et Les Agents," ch. 2; ESMEIN, "Droit constitutionnel," pt. II, ch. 5; also pt. I, ch. 3; also pp. 198–209; GUMPLOWICZ, "Allgemeines Staatsrecht," bk. I, ch. 9; HARE, "Election of Representatives," chs. 1–5; JELLINEK, "Recht des modernen Staates," bk. III, ch. 17; KENT, "Commentaries," Lect. XI; LAVELEYE, "Le Gouvernement dans la Démocratie," vol. II, bk. VIII; LEACOCK, "Elements of Political Science," pt. II, ch. 2; LECKY, "Democracy and Liberty," vol. I, chs. 3 and 4; LEWIS, "Use and Abuse of Political Terms," ch. 12; LIEBER, "Civil Liberty and Self-government," chs. 15–17; also his "Political Ethics," vol. II, bk. VI, chs. 1–3; MILL, "Representative Government," chs. 5, 7, 9, 12, 13; ORDRONAUX, "Constitutional Legislation," ch. 6; POSADO, "Tratado de Derecho Politico," vol. II, bk. VI, chs. 1–3; REINSCH, "American Legislatures and Legislation Methods"; ROUSSEAU, "Contrat social," bk. II, ch. 15; SIDGWICK, "Elements of Politics," chs. 20 and 23; ST. GIRONS, "La Séparation des Pouvoirs," bk. I, ch. 2; STORY, "Commentaries," bk. III, ch. 8; WILSON, "Congressional Government," chs. 2 and 3; also his "Constitutional Government," chs. 4 and 5.

I. ORGANIZATION: THE UNICAMERAL VERSUS THE BICAMERAL PRINCIPLE

Early Ideas

IT has become almost an axiom in political science that legislative bodies should consist of two chambers.[1] At the present time those constructed on the unicameral principle

[1] Cf. Esmein, "Droit constitutionnel," third ed., p. 72; Bryce, "American Commonwealth," abridged ed., p. 331; Laveleye, "Le Gouvernement dans la Démocratie," vol. II, p. 7; Story, "Commentaries," vol. I, sec. 548.

are found only in Greece, Luxembourg, Servia, the Canadian provinces of British Columbia, Manitoba, and Ontario, a few of the smaller German states, and some of the Swiss cantons. Formerly, however, the unicameral idea found more favor than now. In America, in the eighteenth century, it had an influential advocate in Benjamin Franklin, who is said to have compared a double-chambered legislative assembly to a cart with a horse hitched to each end, both pulling in opposite directions. Largely through his influence the legislature of Pennsylvania under its first constitution was constructed on the unicameral principle, and we have the testimony of John Adams that the question of whether the early American legislatures generally should consist of one or two chambers was one of transcendent importance at the time of the adoption of the first state constitutions.[1]

Experience with the Unicameral System

In France, at the time of the Revolution, the unicameral idea had many supporters, and the principle was incorporated in the constitution of 1791 by an almost unanimous vote of the National Assembly, and was continued in the constitution of 1793.[2] The constitution of the year III (1795), however, established the bicameral system; and it was continued until 1848, when the single chamber was again reverted to, though only for a brief interval. Among the powerful advocates of the unicameral principle in 1848 was Lamartine, as Turgot had been its ablest defender at the time of the Revolution. The experience of France with single-chambered legislative assemblies, however, was not satisfactory; and their proceedings, it is said, "were marked by violence, instability, and excesses of the worst kind." [3]

[1] See his essay entitled, "A Defense of the American Constitutions."

[2] For a summary of the views of the advocates and opponents of the single chamber system in the French Constituent Assembly of 1789, see St. Girons, "La Séparation des Pouvoirs," pp. 175 ff.

[3] Boissy d'Anglas, one of the French advocates of the bicameral system at the time of the Revolution, asserted in 1795 that many of the evils which Frenchmen had suffered since the beginning of the Revolution had been due to the violence and excesses

With remarkably few exceptions the states which have experimented with the single chamber system have abandoned it for the bicameral system. In England, during the Commonwealth, it was tried for a brief period, but without success; and the House of Lords, which had been abolished, was soon restored. The lack of a second chamber in the national congress was one of the causes of dissatisfaction with the Articles of Confederation in the United States, and, with the exception of Benjamin Franklin, none of the framers of the constitution favored retaining the unicameral system.[1] In Pennsylvania, where it existed for a time, we are told that it was marked by a "want of stability" and resulted in "extremely impulsive and variable legislation."[2] It was soon abandoned in Pennsylvania and in the few other states where it had been introduced. Other countries, notably Spain, Portugal, Naples, Mexico, Bolivia, Ecuador, and Peru, have all abandoned it, after a fair trial, for the double-chambered system.

The chief argument advanced in favor of the unicameral

of a single-chambered legislative assembly. See also St. Girons, "La Séparation des Pouvoirs," p. 178.

[1] Compare Hamilton, in "The Federalist," Nos. 62 and 63. See also the editor's note to Ford's edition of "The Federalist," No. 22, p. 142. "The Continental Congress," he remarks, "had illustrated the evils of a single legislative body. Frequently it had adopted resolutions only to repeal them the next day, and in several cases had rejected, considered, and adopted, and again rejected in the course of a week, the same motion; the change being due to the arrival or departure of members, and to the lack of any check." See also Kent's "Commentaries," twelfth ed., vol. I, p. 222, where it is said that "the instability and passion" which marked the proceedings of the single chamber and assemblies of Pennsylvania and Georgia "were very visible at the time and the subject of much public animadversion." "No portion of the political history of mankind," remarks Kent, "is more full of instructive lessons on this subject, or contains more striking proof of the faction, instability, and misery of states, under the dominion of a single unchecked assembly, than that of the Italian republics of the middle ages which arose in great numbers and with dazzling but transient splendor, in the interval between the fall of the western and the eastern empire of the Romans. They were all alike ill constituted, with a single unbalanced assembly. They were alike miserable and all ended in similar disgrace."

[2] "The Federalist," Ford's ed., p. 142, note 1.

Argument in Favor of the Unicameral System

system by the French statesmen and political writers in 1789 and again in 1848 was that it secured "unity" instead of "duality" in the organization of the legislative branch of the government. Two or three chambers, it was argued, meant two or three sovereignties.[1] "The law," said Sieyès, "is the will of the people; the people cannot at the same time have two different wills on the same subject; therefore, the legislative body which represents the people ought to be essentially one. Where there are two chambers, discord and division will be inevitable and the will of the people will be paralyzed by inaction."[2] The same view was expressed by Lamartine, who maintained that the double chamber sacrificed the great principle of unity by dividing the sovereignty of the state.[3] A similar line of reasoning was pursued by Condorcet, Robespierre, and other leaders in France at the time of the Revolution. In America, likewise, the same kind of argument was advanced by Franklin and others against the bicameral theory. Legislation being merely the expression of the common will, the necessity of committing it to two separate assemblies, each having a veto upon the action of the other, was not apparent. "All the arguments," says Judge Story, "derived from the analogy between the movements of political bodies and the operations of physical nature, all the impulses of political parsimony, all the prejudices against a second coördinate

[1] Duguit "Droit constitutionnel," p. 344.

[2] Quoted by Laboulaye in "Questions constitutionnelles," p. 349.

[3] Cited by Lieber in his "Civil Liberty and Self-government," p. 199. Compare also Destutt de Tracy, who argued that "the legislative body ought to be a unit in order that it may legislate without struggling against itself." "Commentaire de l'Esprit des Lois," bk. XI, ch. 2. See also St. Girons, "La Séparation des Pouvoirs," pp. 175–176. One manifest advantage of the single chamber principle is that in countries where the cabinet system of government prevails ministerial responsibility can be more readily enforced. The existence of two chambers under such a system is confusing, and one of them must necessarily play a subordinate rôle, since it has worked out in practice that responsibility to two chambers cannot very well be enforced. Great Britain is just now experiencing the difficulty of having two chambers, each claiming to exercise equality of powers in financial legislation.

legislative assembly stimulated by the exemplification of it in the British Parliament, were against a division of the legislative power." [1] In short, a double-chambered legislature was an assembly divided against itself.

The View of John Adams

In America, John Adams combated the doctrines of Franklin, Turgot, and the other French critics of the bicameral system, in a rather remarkable essay entitled "A Defense of the Constitutions of Government of the United States," in which, among other things, he defended with ability and learning the principle of the division of the legislative power between two coördinate assemblies. He reviewed the history of free governments and undertook to show that government by single assemblies had "generally been visionary if not corrupt and violent and had usually ended in despotism." "Of all possible forms of government, a sovereignty in a single assembly, successively chosen by the people, is," he said, "perhaps the best calculated to facilitate the gratification of self-love, and the pursuit of the private interests of a few individuals — in one word, the whole system of affairs and every conceivable motive of hope or fear will be employed to promote the private interests of a few of their obsequious majority; and there is no remedy but in arms."

Advantages of a Second Chamber

Notwithstanding all the objections raised against the bicameral system, experience has apparently established its advantages over the single chamber scheme. "It accompanies the Anglican race," observes Francis Lieber, "like the common law, and everywhere it succeeds." [2] "Of all the forms of government that are possible among mankind," says Lecky, "I do not know any which is likely to be worse than the government of a single omnipotent

[1] "Commentaries," vol. I, sec. 548. Duguit denies that the principle of "duality" in the structure of the legislature necessarily means conflict and enfeeblement of the legislative power or retards needed political reforms, and he shows from the experience of France that assertions to the contrary are not supported by the facts. "Droit constitutionnel," p. 347.

[2] "Civil Liberty and Self-government," p. 197.

democratic chamber. It is at least as susceptible as an individual despot of the temptations that grow out of the possession of an uncontrolled power, and it is likely to act with much less sense of responsibility and much less real deliberation." [1]

It prevents Hasty Consideration of Legislative Measures

The advantages of a second chamber may be summarized as follows: First, it serves as a check upon hasty, rash, and ill-considered legislation. Legislative assemblies are often subject to strong passions and excitements and are sometimes impatient, impetuous, and careless. The function of a second chamber is to restrain such tendencies and to compel careful consideration of legislative projects. It interposes delay between the introduction and final adoption of a measure and thus permits time for reflection and deliberation.[2] "One great object of the separation of the legislature into two houses acting separately and with coordinate powers," said Chancellor Kent, "is to destroy the evil effects of sudden and strong excitement and of precipitate measures springing from passion, caprice, prejudice, personal influence, and party intrigue, which have been found by sad experience to exercise a potent and dangerous sway in single assemblies.[3] It is clear, says Bluntschli, in explaining the advantages of the bicameral system, that four eyes see more and better than two, especially when a given subject may be considered from different standpoints.[4]

It affords Protection against Legislative Despotism

In the second place, the bicameral principle not only serves to protect the legislature against its own errors of haste and impulse, but it also affords a protection to the

[1] "Democracy and Liberty," vol. I, p. 299.

[2] Story, "Commentaries," vol. I, secs. 550–554.

[3] "Commentaries," vol. I, lect. XI. "There is certainly no proposition in politics," says Lecky, "more indubitable than that the attempt to govern a great heterogenous empire simply by such an assembly must ultimately prove disastrous, and the necessity of a second chamber to exercise a controlling, modifying, retarding, and steadying influence has acquired almost the position of an axiom." "Democracy and Liberty," vol. I, p. 300. See also St. Girons, "La Séparation des Pouvoirs," p. 185.

[4] "Allgemeines Staatsrecht." p. 6.

individual against the despotism of a single chamber. The existence of a second chamber is thus a guarantee of liberty as well as to some extent a safeguard against tyranny.[1] Where the whole legislative power is intrusted to a single omnipotent assembly, the restraining element of a second chamber is lacking. There is a natural propensity on the part of legislative bodies to accumulate power into their hands, to absorb the powers of the executive and the judiciary, in short, to draw into their grasp the whole government of the state. They have a constant tendency, observes Judge Story, to overstep their proper boundaries, from passion, from ambition, from inadvertence, from the prevalence of faction, or from the overwhelming influence of private interests. Under such circumstances, he adds, the only effective barrier against oppression, whether accidental or intentional, is to "separate its operations, to balance interest against interest, ambition against ambition, the combinations and spirit of dominion of one body against the like combinations and spirit of another."[2] The existence of a second chamber, continues Story, doubles the security of the people by requiring the concurrence of two distinct bodies in any scheme of usurpation or perfidy where otherwise the ambition of a single body would be sufficient.[3] "The necessity of two chambers," says Bryce, "is based on the belief that the innate tendency of an assembly to become hateful, tyrannical, and corrupt, needs to be checked by the coexistence of another house of equal authority. The Americans restrain their legislatures by dividing them,

[1] Cf. St. Girons, "La Séparation des Pouvoirs," p. 182. See also Laveleye, "Le Gouvernement dans la Démocratie," vol. II, p. 11.

[2] "Commentaries," vol. I, sec. 558. "The executive power in our government," said Jefferson, "is not the only, perhaps not even the principal, object of my solicitude. The tyranny of the legislature is really the danger most to be feared and will continue to be so for many years to come." Letter to Madison, March 15, 1789.

[3] *Ibid.*, sec. 700.

just as the Romans restrained their executives by substituting two consuls for one king." [1]

It gives Representation to Different Interests or Classes

A third advantage of the bicameral system is that it affords a convenient means of giving representation to special interests or classes in the state and particularly to the aristocratic portion of society, in order to counterbalance the undue preponderance of the popular element in one of the chambers, thus introducing into the legislature a conservative force to curb the radicalism of the popular chamber. We cannot, says Bluntschli, ignore the distinction between the aristocratic and democratic elements in the population of the state and allow one of these elements alone representation in the legislature without doing the other an injustice.[2] Montesquieu asserted, not without some truth, that there are always persons in every state, distinguished by their birth, wealth, or honors, to whom, if they are confounded with the common people and are given only an equal share in the government with the rest, the common liberty would be slavery and who would have

[1] "The American Commonwealth," abridged ed., p. 331. Sidgwick observes that passions are more likely to affect a single body than two, and that the danger of encroachments by the legislature on the functions of the executive is undoubtedly diminished by the existence of two legislative chambers. See further concerning the safeguards which the bicameral system affords against legislative encroachments upon individual liberty, his "Elements of Politics," p. 406. John Stuart Mill did not attach much importance to the value of a second chamber as a check upon precipitancy of legislation or as a means of compelling deliberation, and he expressed the opinion that the subject had received an amount of attention, especially on the continent of Europe, out of all proportion to its importance. "For my own part," he said, "I set little value on any check which a second chamber can apply to a democracy otherwise unchecked." Yet Mill admitted that a second chamber serves an important purpose as a check upon legislative despotism. A majority in a single assembly, he said, with no check but their own will, "easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority." "The same reason which induced the Romans to have two consuls," he observed, "makes it desirable that there should be two chambers that neither of them may be exposed to the corrupting influence of undivided power even for the space of a single year." "Representative Government," ch. 13.

[2] "Allgemeines Staatsrecht," pp. 63–64. Compare also Esmein, "Droit constitutionnel," pp. 100–101.

no interest in supporting the government, as most of the popular resolutions would be against them. "The share they should have in the legislature," he declared, "ought to be proportioned to their other advantages in the state, which can happen only when they form a body that has a right to check the licentiousness of the people, as the people have a right to oppose any encroachment of theirs." [1]

Mill's Scheme

John Stuart Mill advocated a second chamber constructed on the principle of political experience and training without reference to considerations of birth or wealth. If one chamber, said Mill, represents popular feeling, the other should represent personal merit, tested and guaranteed by actual public service and fortified by practical experience. If one is the people's chamber, the other should be a chamber of statesmen, a council composed of all living public men who have passed through important political offices or employments. Such a chamber, Mill argued, would be not merely a moderating body, or a simple check, but also an impelling force. It would be a body of natural leaders and would guide the people forward in the path of progress.[2] The best constitution of the second chamber, he declared, is that which embodies the greatest number of elements exempt from the class interests and prejudices of the majority, but having in themselves nothing offensive to democratic feeling.[3]

[1] "Esprit des Lois," bk. XI, ch. 6.

[2] "Representative Government," ch. 13. Mill suggested that such a chamber might include all who had had distinguished legislative experience, all who had held high judicial positions, all who had been members of the cabinet for at least two years, all who had held the highest positions in the army and navy, all who had held diplomatic positions of the first rank, and those who had been governors of colonies for a certain length of time. In short, membership in this chamber should, he said, be restricted to those who had attained legal, political, or military distinction.

[3] M. Duguit, a distinguished French writer, thinks an ideally constituted legislative body would be that in which one chamber would represent the population as a whole and the other the various groups into which the population is divided: communities, families, commercial, scientific, and even religious associations, etc. The legislature would then represent all the important constituent elements of the country. "Droit constitutionnel," p. 349.

Capital and Labor Represented

The bicameral system also affords a means of giving separate representation to the somewhat dissimilar interests of capital and labor. An actual illustration of the value of this principle is found, we are told by a well-known writer, in the Australian state of Victoria, where the upper chamber of the legislature is made up mainly of the representatives of capital, while the other chamber is composed principally of the representatives of labor. This is the result chiefly of a restricted suffrage for the upper house, higher property qualifications for membership in it, and the non-payment of its members for their services.[1]

The Bicameral System in Federal States

Finally, the bicameral system affords an opportunity, in states having the federal form of government, of giving representation to the political units composing the federation. In order to maintain the proper equilibrium between the component members and the federation as a whole, the former ought to be represented in one chamber of the legislature without regard to population, that is, represented as distinct political organizations.[2] This, in fact, is the principle upon which the legislatures of most states having the federal form of government are at present constructed.

The Two Chambers should differ in Principle

The eighteenth century French doctrine that the bicameral system is incompatible with the principle of the unity of sovereignty will, upon examination, be seen to be untenable.[3] Division of the legislative body into two chambers does not involve a division of the sovereignty of the state any more than the distribution of governmental power between

[1] Edward Jenks, "Government of Victoria" (1891), p. 379. The idea of allowing special representation to the interests of capital and labor was advocated by Guizot in his "Démocratie en France." There are in every society, Guizot observed, two "principal types of social situation": that of men who live from the income of their property, and that of men who have no capital, but live by their labor. Each of these essential and eternal elements in every society should have distinct representation, without which one will be sacrificed to the other. Quoted by Laveleye in "Le Gouvernement dans la Démocratie," vol. II, p. 7.

[2] Compare Duguit, "Droit constitutionnel," sec. 56.

[3] On this point see Duguit, "Droit constitutionnel," p. 345; and Lieber, "Civil Liberty and Self-government," pp. 197 ff.

legislative, executive, and judicial organs means a division of sovereignty. So long as the concurrence of both chambers is necessary to legislate, that is, so long as legislation emanates from the assembly as a whole, there is not duality, but unity. Law is the will of the people, observes Laboulaye, whatever may be the mode employed for enacting it.[1] Where, however, the structural principle of both chambers of the legislature is the same, much of the value of the bicameral system is lost. If the two chambers are identical in constitution, then the second is a mere duplication of the first; and the advantages of the additional chamber are questionable. "If the two houses were elected for the same period and by the same electors," observes Lieber, "they would amount in practice to little more than two committees of the same house; but we want two *bona fide* different houses representing the impulse as well as the continuity, the progress and the conservatism, the onward zeal and the retentive element, innovation, and adhesion, which must ever form integral elements of all civilization. One house, therefore, ought to be large; the other comparatively small, and elected or appointed for a longer time."[2] Some writers maintain that no advantage whatever is to be gained by the bicameral system if the two chambers are identical in constitution. In such a case it is, says Bluntschli, like employing duplicate organs to do the same thing. Bluntschli argues, with good reason we believe, that the upper chamber ought to rest on a different basis from the lower chamber, that it ought, to some extent at least, to represent special classes or interests or political units as such without full regard to population; while the lower chamber ought to represent the opinion and interests of the mass of population, and to this end the representative ought to be chosen by the whole body of

[1] Quoted by Laveleye in his "Le Gouvernement dans la Démocratie," vol. II, p. 9.

[2] "Civil Liberty and Self-government," p. 108.

the citizens.[1] Judge Story was of the same opinion. The division of the legislature into two branches, he declared, would be of little or no intrinsic value unless the organization was such that each house could operate as a real check upon undue and rash legislation.[2]

But it is not necessary to the success of the bicameral system that every class and interest in the community should be given distinct and separate representation. What is required in order to realize the full value of the bicameral principle is that the two chambers should be differently composed and should rest on dissimilar bases. The members of one chamber ought to enjoy longer tenures, they ought to represent a larger constituency, higher membership qualifications ought to be required of them, and they might well be chosen in a different manner and by a differently constituted electorate.[3] Where these requirements exist there will always be one chamber smaller in size than the other, possessing a higher degree of experience and perhaps of ability, more conservatism of spirit, and representing more fully the higher property and intellectual interests of the state. Thus the high age qualifications (the attainment of the fortieth year) required of senators in Belgium, France, and Italy has had the effect of securing more experienced statesmen in the legislatures of those countries. The longer tenure, the larger constituency, and the method of indirect election for members of the United States Senate tend to secure a more experienced, more conservative, and, on the whole, an abler body of legislators than is found in the House of Representatives. The same is true of the upper chambers of the Australian Commonwealth, and the republics of Brazil, Mexico, and Switzerland. The hereditary principle which prevails almost wholly in the

[1] "Allgemeines Staatsrecht," bk. II, ch. 6.

[2] "Commentaries," vol. I, sec. 699.

[3] Compare Sidgwick, "Elements of Politics," ch. 23. See also Bluntschli, "Allgemeines Staatsrecht," bk. II, ch. 6, on the constitution of upper chambers.

structure of the upper chamber in Great Britain and to a less degree in Austria, Hungary, and Spain diminishes rather than increases the efficiency of the legislature; yet under restrictions which it has been proposed to introduce into the English system the principle would not be without its advantages, since it would provide a means of introducing into the legislature a class of educated and leisured men who have had exceptional opportunities for acquiring political information and for imbibing the result of political experience, without at the same time bringing into the legislature large numbers of men who add little or no strength. The appointive principle which prevails in Italy for the constitution of the upper chamber, and to a less degree in several other European states, is out of harmony with modern notions of representation, yet it has the advantage of insuring a place in the legislature for distinguished men who have held public office and also for men who have attained eminence in science, art, and the learned professions.[1]

Proper Constitution of the Upper Chamber

Perhaps the ideal mode of determining the membership of the upper chamber lies in a combination of some or all of the above systems, if we eliminate the Norwegian method of coöptation and the British hereditary principle, neither of which commends itself to us. A certain number of members of whom high qualifications are required might very properly be elected upon the basis of a restricted suffrage from the larger administrative subdivisions into which the state is divided; a certain number might be elected by the local governments, such as the provincial legislatures or municipal councils; a limited number might be appointed by the excutive from those who have achieved eminence in the state or who have held certain high offices, etc.

With regard to the constitution of the lower house, there is a substantial unanimity of opinion and of practice that

[1] On the value of appointment as a source of membership in the upper chamber, see Sidgwick, *op. cit.*, p. 476.

it should rest upon a popular basis, that is, its members should be chosen by direct election, upon the basis of a wide suffrage and for short terms. Finally, the experience of the past demonstrates the wisdom of the principle of inequality of powers as between the two chambers. Nearly everywhere the upper chamber is intrusted with a share, negative or positive, in the administration of the government, often a certain participation in the control of the foreign policy of the state, and sometimes is vested with important judicial functions. This has a tendency to increase the dignity and prestige of membership therein and thus secure legislators of higher ability and added conservatism. The scheme of partial renewal common in the organization of the upper chambers is likewise a valuable principle, in that it tends to secure the element of experience and preserve continuity of membership.

II. METHODS OF APPORTIONMENT

Representation of Political Units

Several methods of apportioning or distributing legislative representatives have been followed. One is to distribute them among the political divisions of the state without regard to their population, or at least without exclusive regard to it. In all the important federal unions except the German Empire and the Dominion of Canada the principle of equality of representation among the component members prevails in the construction of the upper chambers. In the German *Bundesrath* the number of votes to which each state of the empire is entitled varies from one to seventeen; and in the Canadian House of Lords the number varies from four to twenty-four, the latter being the number allowed the province of Quebec. In the French Republic the number of senators from each department varies from one to ten.

Another method of distribution is to apportion the representatives among the political divisions of the state

with some regard to the amount or value of property in each. The chief merit of such a method is that it takes into consideration one of the important elements which enter into the physical make-up of the state. The doctrine that taxation should go hand in hand with representation has long been a cherished political theory of the people of America and England, and perhaps no better system could be devised for protecting the rights of property than by giving it a share of representation in the legislative branch. For other reasons, however, it has not commended itself to the people of democratic states; and outside of a few European monarchies where property is taken into consideration to some extent in organizing representation in the upper chambers, the system no longer prevails. In no state is property to-day the sole basis of representation in either chamber, and the few remaining traces of the principle that have survived the nineteenth century will doubtless disappear in the course of time.

Representation of Property

Another principle is that which bases representation on the total population, citizens and aliens, male and female, enfranchised and unenfranchised alike, and not on the number of voters merely. This is now the almost universal rule governing the apportionment of representation in lower chambers, and in some states it is also the basis of representation in the upper chambers. It possesses the element of simplicity and uniformity and is regarded as being more in harmony with present day notions of representative government.[1] The ratio of representation varies widely among different states. For the national House of Representatives in the United States it is now one representative for every 193,000 of the population.[2] In the

Representation based on Population

[1] Compare Story, "Commentaries," vol. I, secs. 631–635; and Esmein, "Droit constitutionnel," p. 207.

[2] The number of members from each state in the national House of Representatives varies from one in Delaware, Idaho, Montana, Nevada, Utah, and Wyoming to thirty-seven, the number apportioned to the state of New York.

United Kingdom of Great Britain and Ireland it is one member for every 62,700 of the population; in Belgium, one member for every 40,000; in Brazil, one member for every 70,000; in Mexico, one for every 40,000; in Switzerland, one for every 20,000; in France, one for every 100,000; in the German Empire, one for every 100,000; in Canada, one for every 22,600 of the population. The same variety prevails among the individual states composing the federal republic of the United States, where the principle of apportionment on the basis of population is generally the rule for the constitution of both the upper and lower chambers. Perhaps an ideal system would be one which would take into consideration the elements of population, geographical area, and property combined, if there were any criteria for determining the relative weight which should be given to each of these elements. As yet no satisfactory scheme of this kind has been devised.[1]

III. METHOD OF CHOICE

Electoral Districts

For convenience in choosing representatives it is customary to divide the state into electoral circumscriptions or districts. The entire body of representatives might be chosen from the state at large on a general ticket, each elector being allowed to cast a vote for the entire number; but in states of considerable geographical area, where several hundred members are to be elected, such a method would obviously be impracticable. The time and effort involved in voting such a ticket would be very great; and,

[1] The French constitution of 1791 (title III, sec. 1) attempted a scheme of this kind. It apportioned the 745 representatives of the legislative body among the 83 departments "according to the three proportions of territory, population, and tax," 247 being "accredited" to territory, 249 to population, and 249 to the direct tax. See Anderson, "Constitutions and Documents of France," p. 65. But this scheme was abolished by the constitution of 1793, which declared population to be the sole basis of representation; and this principle was continued by the constitutions of 1795 and 1848. The latter principle, says Esmein, is the correct one. "Droit constitutionnel," p. 206.

what is of more importance, the ignorance of the elector concerning the candidates from distant parts of the state would be so great that an election under such circumstances would be largely a farce. The practice of all states, therefore, is to divide their territory into electoral districts or to utilize for this purpose the political subdivisions already in existence.

In constituting electoral districts two methods are employed: one is to parcel the state into as many districts as there are representatives to be chosen and allow a single member to be chosen from each; the other is to create a smaller number of districts, from each of which a number of representatives is chosen on the same ticket. The former is known as the single member district plan; the latter, as the general ticket method. Each has been employed by most states at different times in their history, though nearly all have come at last to the single member district method. In the United States, for a long time, representatives in Congress were chosen from the state at large, each elector being allowed to cast a vote for the entire ticket; but the objections to the method were so serious that Congress, in 1842, enacted that thereafter they should be chosen by districts containing as nearly as possible equal populations, and this rule still prevails.

In Great Britain the single member district method has long prevailed, though from 1867 to 1885 a few of the more populous boroughs were permitted to choose their members by general ticket. These were the so-called "three-cornered" constituencies, thirteen in number, in which the system of proportional representation was applied. The method first employed in the French Republic for choosing members of the Chamber of Deputies was the single district system (*scrutin d'arrondissement*); but in 1885 the general ticket method was adopted, under which all the deputies apportioned to each department were elected from the department at large by general ticket

(*scrutin de liste*). In 1889, however, the single member district method was reverted to, and it is still in force. Italian practice has varied in a manner very similar to that of France, but since 1891 the general ticket method has prevailed.

The General Ticket Method

The general ticket method is employed in the states composing the Commonwealth of Australia (Queensland excepted), for choosing the six senators to which each is entitled in the Commonwealth Parliament, as well as in those countries where schemes of proportional representation exist, notably in Belgium, Denmark, Cuba, Norway, Portugal, Sweden, certain districts in Brazil, in Italy for provincial and municipal elections, in certain parts of Spain, in Japan, in some of the Swiss cantons, in Iceland, Tasmania, and in other states.

The District Ticket Plan

In the states of the American Union the district method of choosing representatives is the rule, though there are a few exceptions.[1] Likewise in the choice of members of municipal councils the single district or ward method generally prevails, especially where the single-chambered council exists, though there are some notable exceptions.[2] In some municipalities a mixed system is employed, according to which a certain number of members, in addition to the ward representatives, are chosen from the city at large on general ticket.[3]

Advantages of the District Method

The chief advantage of the single member district method is its simplicity and convenience. Where the country is divided into as many electoral circumscriptions as there are representatives to be chosen, the task of the voter

[1] See Reinsch, "American State Legislatures," pp. 197–200.

[2] The general ticket system is in use in St. Louis, Buffalo, Louisville, St. Paul, and in the cities of Massachusetts and Kentucky for the election of municipal councils. See Fairlie, "Essays on Municipal Administration," p. 131.

[3] Thus in San Francisco the board of supervisors, the Cook County, Illinois, board of commissioners, and also the city council of Memphis are chosen from the city at large instead of by wards. In various cities the board of education is chosen in the same way. On the general ticket system see Commons, "Proportional Representation," ch. 4

in each district is restricted to the simple duty of casting a ballot for one representative. Owing to the necessarily restricted area of the electoral district under this system, the chances are considerable that the candidate will be better known to the voters than would be possible under the general ticket system, which requires larger districts,[1] and that he will in turn be more familiar with the needs and conditions of the district which he is chosen to represent. Another advantage of the district method is that it tends to secure representation to the minority party in the state, city, or province, as a whole. Obviously, if all the representatives are chosen from the state at large on a general ticket, the party having a bare majority will elect all and the minority none. Thus in the United States, as long as representatives in Congress were chosen from the state at large, the majority party in each usually elected the entire congressional delegation; whereas if the district ticket method had prevailed, some districts in states not predominantly in control of one party or the other would have chosen representatives belonging to the minority party. The injustice of such a scheme led to the substitution of the district method, as has been said, by an act of Congress in 1842.

The same inequality is complained of with regard to the general ticket method of choosing presidential electors in the United States to-day, a system which usually gives

[1] Among the advocates of the single member district method are Montesquieu ("Esprit des Lois," English ed. by Prichard, vol. I, p. 166); Sidgwick ("Elements of Politics," p. 396); Bluntschli ("Politik," p. 444); Esmein ("Droit constitutionnel," p. 205); Brougham ("The British Constitution," Works, vol. XI, p. 73); Bradford ("Lessons of Popular Government," vol. II, p. 168). Where several candidates are chosen from the same district, says Bradford, the voter "has to decide upon their relative merits without even the party guide, a task for which he is unfitted, and which, unless he has some special object to gain, he will renounce in disgust." In Boston, where the twelve aldermen are chosen at large, each elector being allowed to vote for seven, "it is ludicrous," he says, "to see the helplessness with which voters, even among the well-to-do and educated, gaze at this list of twelve names, which to them mean absolutely nothing else."

the predominant party in each state all the presidential electors to which the state is entitled, though the numerical preponderance of the party in the majority may be quite insignificant.[1]

Objections to the District Method

The objections to the single member district method are: first, that it narrows the range of choice and often leads to the election of inferior men. This is notably the case in the large cities where the ward system of choosing aldermen is almost universal. Experience abundantly proves that in cities where such a system prevails not only inferior, but often corrupt, representatives are chosen. In the second place, the district system leads to the choice of men who are apt to represent local interests rather than men who represent the interests of the country as a whole, and who therefore are likely to take a narrow and particularistic view of public questions instead of a broad national view. The experience of both France and Italy with the *scrutin d'arrondissement* system of choosing deputies clearly established the truth of this statement.[2] In the case of Italy it was finally abandoned for the general ticket method, coupled with provision for a system of proportional representation. The district system encourages the view that the representative is the *mandataire* of his constituency rather than of the country; that, in short, he is commissioned to represent a part rather than the whole of the state.[3] Moreover, the custom which regards the legislator

[1] See Dougherty, "The Electoral System in the United States," ch. 1.

[2] Cf. Lowell, "Government and Parties in Continental Europe," vol. I, pp. 16, 158; Duguit, "Droit constitutionnel," p. 355, and Benoist, "Crise de l'État moderne," pp. 56–64.

[3] Compare Duguit, "Droit constitutionnel," p. 355; and Esmein, "Droit constitutionnel," p. 207; also an article by M. Goblet in the "Revue politique et parliamentaire," 1905, where it is said that the district system abases the intellectual character of the legislature and substitutes consideration of particular interests for the general interests. Compare on the contrary the remarks of Mr. A. J. Balfour in the House of Commons, April 13, 1894: "I have always been of the opinion that the whole basis of representation in this House is a local basis, and that the various localities, when they send representatives here, while conscious, of course, of the imperial obli-

as the representative of a particular locality is responsible for the election of men whose energies are likely to be engrossed with the pressure of petty local influences, and therefore often deprives the state of the services of able statesmen who would be willing to serve in the legislature could they be freed from such influences and be regarded strictly as representatives of the country at large. In the third place, the district system increases powerfully the temptation of legislative majorities to "gerrymander" the state, that is, to construct the electoral districts in such a way as to give the majority party more representatives than its voting strength entitles it to.[1]

The Mixed System

It would seem that a combination of the general ticket and district methods by which a certain number of representatives would be chosen according to each method possesses decided advantages over either by itself. It would secure all the principal advantages of both and at the same time diminish the manifest disadvantages of the district method.[2]

IV. DIRECT VERSUS INDIRECT ELECTION

The Method of Indirect Election

As a means of diminishing the evils of an extended suffrage some states have employed a system of indirect or double elections for choosing representatives and sometimes

gations resting upon them, must vote as localities and have regard to the interest of localities." "Parliamentary Debates," 4th Series, vol. XXIV, p. 386.

[1] See Commons, "Proportional Representation," ch. 3, for a discussion of the evils of the district system with particular reference to the practice of gerrymandering; see also Reinsch, "American Legislatures," pp. 200–209.

"The aim of gerrymandering," says Bryce, "is to lay out the districts so as to secure in the greatest possible number of them a majority for the party which conducts the operation. This is done sometimes by throwing the greatest possible number of votes into a district which is anyhow certain to be hostile, sometimes by adding to a district where parties are equally divided some place in which the majority of friendly voters is sufficient to turn the scale." "American Commonwealth," ch. 13.

[2] The "mixed" system is sometimes applied in choosing the members of municipal councils, notably in Ohio, Indiana, and Iowa. It has also been employed for choosing the delegates to constitutional conventions, for example in New York State in 1894, where a certain number of the delegates were chosen from the state at large, the rest from districts.

also for other public functionaries. According to this method the whole body of voters in the electoral district choose a smaller number of intermediate electors, and these in turn elect immediately the representatives or other officers to be chosen. Under the French constitution of 1791, for example, the members of the National Assembly, and also all magistrates and administrators of the departments and districts, were chosen in this manner.[1] The system was continued for the election of certain administrative officers under the constitution of 1793 (art. 8), for the election of representatives under the constitution of 1795 (art. 41), was retained after the restoration, 1814, and was not finally abandoned until 1830. Indeed, senators of the Republic are still chosen by indirect election, that is, they are chosen by electoral colleges in the several departments. The method of indirect election was introduced into the United States constitution for choosing the President and Vice President, though the election has in practice come to be direct. The choice of members of the Prussian *Landtag* is likewise made by bodies of intermediate electors chosen by the primary voters grouped according to a three-class system of suffrage to be described hereafter.

Advantages of the System of Indirect Election

The principal argument in favor of the system of indirect election is that it eliminates to some extent, as has been said, the evils of universal suffrage by confining the ultimate choice to a body of select persons possessing a higher average of ability and necessarily feeling a keener sense of responsibility. Moreover, it tends to diminish the evils of party passion and struggle by removing the object of the popular choice one degree and confining the function of the electorate as a whole to the choice of those upon whom the ultimate responsibility must rest. "This contrivance," says John Stuart Mill, "was probably intended as a slight impediment to the full sweep of popular feeling; giving

[1] Constitution of 1791, title III, ch. 1, secs. 1, 2. See also Lord Brougham's "British Constitution," p. 69.

the suffrage and with it the complete ultimate power to the many, but compelling them to exercise it through the agency of a comparatively few, who, it was supposed, would be less moved than the Demos by the gust of popular passion; and, as the electors, being already a select body, might be expected to exceed in intellect and character the common level of their constituents, the choice made by them was thought likely to be more careful and enlightened and would in any case be made under the greater feeling of responsibility than election by the masses themselves." [1] But experience with the indirect system of election has never worked out in practice satisfactorily. In France it failed to meet the expectations of its authors and was abandoned for the system of direct election, and this has been the experience of most states where it has been tried.[2]

Objections to the System of Indirect Election

Where the party system is well developed, the indirect scheme is likely to degenerate into a cumbrous formality, since the intermediate electors will be chosen under party pledges to vote for particular candidates. This has been the history of the indirect system for choosing the President and Vice President of the United States, where the presidential electors have become mere party puppets, without judgment or freedom of action in performing the high functions that were intended to be exercised by them,[3] and

[1] "Representative Government," ch. 9, p. 180. "Election in two stages has certainly a *prima facie* tendency to improve the quality of the legislature," says Sidgwick, "if it does not become a formality, and if both parts of the process are performed with independence and honesty of purpose; since the competence of the elected electors may be expected to be on the average greater than that of the citizens who elect them, and their sense of responsibility stronger." "Elements of Politics," p. 403.

For a defense of the indirect system, see Plank, "The Commonwealth Reconstructed," and Laveleye, "Le Gouvernement dans la Démocratie," vol. II, bk. IX. ch. 6. Laveleye argues that the system will secure representatives of higher character and ability because the choice will be made after discussion and reflection on the part of the electors.

[2] Compare Duguit, "Droit constitutionnel," pp. 350–351.

[3] See on this point Dougherty, "The Electoral System of the United States," ch. 10.

where the intermediate electors are reduced to the position of party puppets, they are certain to be persons of less weight, as Lord Brougham has observed, because their office is only occasional and temporary and hence their sense of responsibility is weakened.[1] "It may be safely asserted," said Francis Lieber, "that the Anglican people are distinctly in favor of simple elections." "Elections by middlemen deprive the representation of its directness in responsibility and temper; the first electors lose their interest, because they do not know what their action may end in; no distinct candidates can be before the constituents and be canvassed by them, and inasmuch as the number of electors is a small one, intrigue is made easy."[2] Manifestly, whatever may be the advantages of indirect election, a suffrage which limits the power of the voter merely to the selection of those who are to choose instead of those who are to represent him will not satisfy the masses in the present state of the world's opinion concerning the nature of representative government.[3] The idea is out of harmony with the spirit of modern democracy. One of the chief merits of popular government comes from the fact that it stimulates interest in public affairs and increases the political intelligence of the masses. If a middleman is interposed between the voter and the object of his choice, his interest is necessarily diminished and his opportunity for political education weakened.[4] If a person is fit to choose an elector, says Lord Brougham, he is fit to choose a representative. He may, of course,

[1] "The British Constitution," p. 70.

[2] "Civil Liberty and Self-government," p. 174. See also Story, "Commentaries," vol. I, sec. 576.

[3] "I believe," says Lieber, "that neither Americans nor Englishmen would think the franchise worth having were double elections introduced." "Civil Liberty and Self-government," p. 174.

[4] See on this point Bluntschli, "Politik," p. 455; also his "Allgemeines Staatsrecht," p. 69. For a criticism of the indirect system by a French scholar, see Benoist, "Crise de l'État moderne," pp. 82–98.

be unfit to vote wisely upon a measure or a question of public policy and still be fit to choose some one to act for him in such matters.[1] Finally, the indirect system tends to increase the evils of bribery, because the ultimate electoral body is much less numerous and consequently more easily reached by corrupt influences than the whole mass of voters.

7. QUALIFICATIONS AND TERM OF THE REPRESENTATIVE

Qualifications and Disqualifications

The constitutions of all states prescribe certain qualifications for eligibility to the office of representative, and some expressly lay down a number of disqualifications. The qualifications relate for the most part to citizenship, age, and residence; the disqualifications relate mainly to the incompatibility of the legislative function with that of public office. The propriety of excluding aliens from membership in the legislative body is universally recognized, for the reason that aliens, owing no permanent allegiance to the state and having perhaps only a transient interest in its welfare, cannot be expected to possess the requisite qualifications for participating in its government. Moreover, their presence in the legislature would afford a possible means through which the mischiefs of foreign influence might find their way into the public councils.[2]

Citizenship

Age

Practically all constitutions require of the representative the attainment of a certain age, for the reason that the experience and knowledge necessary to a successful discharge of legislative duties are not likely to be possessed by minors. Some states, like Great Britain, require merely the attainment of the majority — twenty-one years of age; most states, however, insist on a higher age, twenty-five for the lower chamber, thirty for the upper, while some require

[1] "The British Constitution," p. 70.

[2] Cf. Story, "Commentaries," vol. I, sec. 618; also "The Federalist," No. 62. In Great Britain formerly a naturalized subject was ineligible to membership in the House of Commons, but this disqualification no longer exists.

the attainment of a greater age. Thus Belgium, France, and Italy require the attainment of forty years for membership in the upper chamber, and thirty years for membership in the lower chamber. A few, like Denmark, make no distinction between the age requirements for eligibility to the two chambers.[1]

Residence

Residence in the district which the member represents is required by positive law or custom in many states. In the United States the representative in Congress is required by the constitution to be an inhabitant of the state, but neither the constitution nor the statutes require that he shall be a resident of the district. Nevertheless, a custom so strong and universal as to possess almost the force of positive law requires that he shall be a resident of the district, and this rule has rarely been disregarded in practice. The popular notion is that an actual resident will feel a deeper concern and possess a more intimate knowledge of the needs and conditions of his constituents than a stranger would. In England, formerly, residence in the district was required by law; but for a long time the rule was systematically ignored, and the statute requiring it was repealed during the reign of George III. "It was found," says Judge Story, "that boroughs and cities were often better represented by men of eminence and known patriotism, who were strangers to them, than by those chosen from their own vicinage."[2] The election of non-residents to represent constituencies to which they are to all intents and purposes strangers is an occurrence so common in England that it has come to be almost as much the rule as the exception. There has been no Parliament

[1] Story observes that "all just reasoning" is against the view that the mere attainment of the twenty-first year is a proper age qualification for membership in the legislative body ("Commentaries," sec. 617). But compare Bluntschli ("Allgemeines Staatsrecht," bk. II, ch. 5), who points out that the English statesmen Pitt, Burke, Fox, Grey, Canning, and Lord John Russell were all in Parliament at the age of twenty, as was also true of the Hungarian statesman Francis Deak.

[2] "Commentaries," vol. I, sec. 619.

for many years which has not contained a large number of members who represented districts in which they were not residents. The English practice not only has the effect of securing the election of representatives who are free from the tyranny of petty local interests and who are likely to take broad national views of public questions, but it affords a means of bringing into and retaining in public life able statesmen who otherwise would be unable to obtain seats in Parliament. Some of the most distinguished leaders in English public life to-day would now be in retirement were the residence requirement in force.[1] In the United States, where the opposite practice prevails, the country has, as a consequence, been deprived of the services of some of its ablest and most experienced statesmen.[2] James Bryce thus criticises the American custom of limiting the choice of representatives to residents of the district: "The mischief is twofold. Inferior men are returned, because there are many parts of the country which do not produce statesmen, where nobody, or at any rate nobody desiring to enter Congress, is to be found above a moderate level of political capacity; and men of marked ability and zeal are prevented from forcing their way in. Such men are produced chiefly in the great cities of the older states. There is not room enough there for all of them, but no other doors to Congress are open. Boston, New York, Philadelphia, and Baltimore could furnish eight times as many good members as there are seats in these cities. As such men cannot enter from their place of residence, they do not enter at all, and the nation is deprived of the

Evils of the Residence Requirement

[1] Two very recent examples of the working of the English rule were the election of Ex-Premier A. J. Balfour in 1905 by a London district after he had been defeated in his home district of Manchester; and the election in 1908 of Winston Churchill, a member of the cabinet, by another constituency after his defeat in the district of which he was a resident.

[2] In this way the Democrats lost the services of their leader, William R. Morrison, and the Republicans their leader, William McKinley, in 1890. Compare Commons, "Proportional Representation," pp. 41–42.

benefit of their services. Careers are moreover interrupted. A promising politician may lose his seat in his own district through some fluctuation of opinion, or perhaps, because he has offended the local wire-pullers by too much independence. Since he cannot find a seat elsewhere he is stranded; his political life is closed, while other young men inclined to independence take warning from his fate." [1]

Property Qualifications

Property qualifications for membership in legislative bodies were very common in former times and still survive in some countries. In Great Britain, for example, until 1858 the possession of an income of £600 was required of county members and £300 of borough members. Under the French charter of 1814 the payment of direct taxes to the amount of at least 1000 francs was required of all deputies and this requirement lasted until 1848. In many of the early state constitutions of the United States membership in the legislatures was restricted to large landowners, taxpayers, or owners of personal property of a certain amount.[2] With the advance of the democratic movement, however, property requirements have disappeared almost everywhere. They still survive only here and there for membership in upper chambers. In the Dominion of Canada, for example, the ownership of $4000 worth of property is required for membership in the House of Lords; in Belgium the ownership of $2400 worth of property, or the payment of $240 of taxes, is required for membership in the senate; and in Sweden the possession of real property of the value of $22,000 or an income of $1200 is required. In the Netherlands only the highest taxpayers are eligible.

Arguments for and against

The chief argument in favor of property qualifications for membership in the legislature is that the ownership of

[1] "American Commonwealth," abridged ed., p. 145.

[2] See an article by W. C. Morey entitled "Revolutionary State Constitutions," in the "Annals of the American Academy of Political and Social Science," vol. IV; also an article on the same subject by W.C. Webster in the same publication, vol. IX.

property is likely to be evidence of certain qualities in the individual which indicate legislative fitness, such, for example, as thrift, economy, intelligence, business ability, conservatism, etc. Moreover, the man of means is more likely to have the time and opportunity for study and devotion to the public service than one who must devote a large part of his energies to earning a livelihood. As a matter of fact, where the principle of non-payment of members is the rule, as in Great Britain, it is practically necessary that the representative should have a private income and thus the possession of property becomes an implied qualification. But against this it may be argued that the possession of property is not necessarily a sign of ability, intelligence, or integrity; nor the lack of it, conclusive evidence of unfitness. The property test would often deprive the state of the services of many well-equipped, able, and patriotic men upon whom the advantages of fortune have not descended.[1]

Disqualifications

It is a principle of representation well recognized in many states that legislative mandate and administrative office are incompatible and ought not to be intrusted to the same hands. Accordingly, we find in the constitutions of most states provisions disqualifying holders of certain offices from occupying seats in the legislature. In the United States the disqualification is practically absolute, exceptions being recognized only in the case of a few minor offices, the duties of which are hardly incompatible with the legislative function. The reason for the disqualification is that those who are charged with the execution of the laws ought not to have a share in their making, both for reasons of expediency and public policy.

Incompatibility of Office and Legislative Mandate

In states having the cabinet system of government, however, the doctrine of the separation of powers is not carried to the same length as in the United States, and

[1] Compare Story, "Commentaries," vol. I, sec. 621; Sidgwick, "Elements of Politics," pp. 400–401; Bluntschli, "Allgemeines Staatsrecht," p. 78.

the chief officers of the executive department are usually not only members of the legislature but are in fact its leaders. In Great Britain and some continental states, however, when a member of the legislature is appointed to a cabinet office, he is required by the constitution to resign his legislative mandate and seek reëlection in order to give his constituents an opportunity to approve or disapprove of his assumption of an administrative office. Formerly religious qualifications were common both in Europe and America, but with the growth of religious liberty and the separation of church and state such requirements have almost entirely disappeared.[1] In some states certain ecclesiastical persons are debarred from sitting in the legislature. Thus in Great Britain the clergy of both the Roman Catholic Church and the Established Church of England are excluded, and disqualifications of a similar nature exist in some of the continental states. In a few of the American states, notably Maryland and Tennessee, ministers of the gospel are ineligible to public office.[2]

Legislative Tenure

The principle of modern representative government requires that the tenure of the representative shall be limited. Manifestly if it is perpetual, or even very long, the responsibility of the representative to his constituents cannot be enforced. Under such circumstances representative government is obviously such only in name, for a permanent mandate in a representative system is a contradiction of terms. There must be periodical elections if the will of the electorate is to be ascertained and made known to the representative and by him enacted into law. Concerning the necessity of frequent elections as a means of preserving the representative system there is to-day little

[1] In a few of the American states persons who do not believe in the existence of God or a future state of rewards and punishments are, however, debarred from holding any office, legislative, or administrative. Oaths are commonly required; but in England this requirement was abolished in 1885, following the unsuccessful attempt to unseat Bradlaugh for refusing to take the oath then required.

[2] Dealey, "Our State Constitutions," p. 63.

difference of opinion; but as to the length of term sufficient to insure responsibility, there is no precise rule or principle of universal application, and, as a matter of fact, the practice of states varies widely. Thus we find the term of the representative varying from one year in some of the American states to seven years in Great Britain, though in the latter country, owing to dissolutions of Parliament, elections in fact come oftener than seven years, the average duration of recent Parliaments having been less than four years. It was the prevailing opinion in certain parts of America at the time of the adoption of the federal constitution that "where annual elections end, tyranny begins"; and this feeling lay at the basis of a good deal of opposition to the constitution which disregarded this principle in fixing the term of national representatives at two years.[1] This opinion, however, was not general and the constitutions of only four of the states to-day, in fact, provide for annual elections of representatives.[2] In none of the European states has the principle of annual elections been introduced, the general practice there being four or five year terms.

Objections to Annual Elections

It may well be questioned whether the disadvantages and inconveniences of annual elections do not outweigh the advantages. The very frequency of elections, observed Judge Story, has a tendency to create agitations and dissensions in the public mind, to nourish factions and encourage restlessness, to favor rash innovations in domestic legislation and public policy, and to produce violent and sudden changes in the administration of public affairs founded upon temporary excitements and prejudices.[3] With regard to the frequency of election necessary to preserve the representative principle, about all we can say is that the mandate ought to be neither too short to defeat

[1] See "The Federalist," No. 53.

[2] Massachusetts, Rhode Island, New York (for members of the lower house), and New Jersey (for members of the lower house).

[3] "Commentaries," vol. I, sec. 593.

its purpose nor too long to remove the representative from all popular control. There is a popular belief that, where no other circumstances affect the case, the greater the power, the shorter ought to be its duration. Perhaps the true principle lies somewhere between the New England idea of annual elections and the British practice of seven years. We agree with the opinion once expressed by Fisher Ames that the term ought to be so long that the representative may understand the interests of the people, and yet so limited that his fidelity may be secured by a dependence upon their approbation.[1]

VI. REPRESENTATION OF MINORITIES

The Present System of Representation is Undemocratic

A subject of prolific discussion within comparatively recent times has been the question of allowing representation in the legislature to minority parties.[2] John Stuart Mill, in his classic work on "Representative Government," declared that "it is an essential part of democracy that minorities should be adequately represented." "No real democracy, nothing but a false show of democracy," he said, "is possible without it." "Nothing is more certain," he affirmed, "than that the virtual blotting out of the minority is no necessary or natural consequence of free-

[1] Elliot's "Debates," vol. I, p. 30.

[2] For the literature of minority representation, see Commons, "Proportional Representation"; Thomas Hare, "On the Election of Representatives," especially ch. 1; Saripolos, "La Démocratie et l'Élection proportionnelle," 2 vols. (1899); Mill, "Representative Government," ch. 7; Laveleye, "Le Gouvernement dans la Démocratie," vol. II, bk. IX, ch. 10; Daguin, "Étude sur la Représentation proportionnelle en Espagne"; Duguit, "Droit constitutionnel," pp. 356–371; Benoist, "Rapport fait au Nom de la Commission du Suffrage universel," April, 1905, "Jour. Off. Doc. Parl."; also his "Crise de l'État moderne," ch. 3; Kloti, "Die Proportionalwahl in der Schweiz" (1889); Naville, "Essai sur la Représentation proportionnelle" (1887); Clement, "La Reforme electorale" (1906); Wendt, "Die Proportionalwahl zur Finnischen Volksvertretung" (1906); Dutcher, "Minority or Proportional Representation" (1872); Bluntschli, "Politik," bk. X, ch. 3; Prins, "La Démocratie et le Régime parlementaire"; also his "De l'Esprit de Gouvernement démocratique," ch. 2; and the various essays on the subject by Séverin de la Chapelle.

dom, but instead is diametrically opposed to the first principle of democracy; representation in proportion to numbers."[1] Mill lamented that most existing democracies were not "governments of the whole people, by the whole people, equally represented, but governments of the whole people, by a mere majority of the people, exclusively represented." The present system of representation is often said to be undemocratic because it in effect permanently disfranchises multitudes of electors and leaves them without representation because they are politically in a minority in their constituencies. Indeed, it may, and not infrequently does, happen that a majority of the representatives in the legislature are returned by a minority of the electors.[2] Against this, however, it may be argued that, although the minority party in a given constituency may have no representation of its own, it is often in the majority in other constituencies, and thus the representatives chosen by the party in those districts where it is in the majority represent the party in the minority districts. Thus it may be said that the Republican minorities in the Southern states of the American union are represented in Congress by Republican members from the Northern states, while the Democrats of New England are represented by the Democratic members returned from the South. But it is asserted that no such theory of representation is sound because a representative chosen by a constituency in one part of a state as vast as the

[1] P. 131 (Universal Library Series). Compare also Lecky, who observes that "it can hardly be contended that the substitution of a representation of the whole nation for a representation of a mere majority is contrary to democratic principles." "Democracy and Liberty," vol. I, p. 220.

[2] "It is to go contrary to the evidence," says the French writer, M. Duguit, "to affirm that a parliament chosen according to the pure majority system expresses more exactly the will of the nation, than one in which the different political parties in the state have their representatives. If the nation itself directly expresses its will, it must be the nation composed of its different parties — it is necessary, in short, that the parliament should be composed of the same elements as the nation." "Droit constitutionnel," p. 359.

republic of the United States cannot adequately represent the members of the party living in extremely distant parts.

Majority Party often elects more than its Share of Representatives

It often happens in the United States, both in the national and the state legislatures, as well as in the municipal councils, that the majority party elects a larger number of representatives than it would be entitled to on the basis of its numerical strength. Thus in the presidential election of 1904 the Republican party, while casting only 54 per cent of the total vote in the country at large, elected 65 per cent of the representatives in Congress. In the Oregon state election of 1906 the Republican party, polling 55 per cent of the total vote cast, elected 88 members of the legislature, while the Democratic party, casting 34 per cent of the total vote, succeeded in electing only 7 representatives. In the New York City election of 1906 the Republicans chose 41 members of the municipal council, whereas on the proportional basis they would have returned only 18 members.[1] Instances of this kind occur at every election, not only in the United States, but in other countries as well.[2] The minority party in a constituency usually does not secure any representation under the existing system, and, taking the aggregate result in all the districts over which the election extends, neither party secures the representation to which its aggregate numerical strength throughout the country entitles it; sometimes the one party

[1] Commons, "Proportional Representation," 2d ed., pp. 9–10.

[2] M. Charles Benoist, a member of the French Chamber of Deputies and a well-known writer on the subject of proportional representation, made a report for the committee on universal suffrage in 1905 in which he showed that from 1898 to 1902 an average of only fifty-three per cent of the electors were represented in the chamber — that is, represented by deputies of their own parties. Thus, in 1902, 5,159,000 electors were represented in the chamber, while 5,818,000 were unrepresented. The famous separation law of 1905, he says, was passed by the vote of 341 deputies who represented exactly 2,647,315 electors out of a total electorate of 10,967,000. One can hardly claim, therefore, he concludes, that the laws of the French Republic represent the will of a majority of the country. See also his "De l'Organisation du Suffrage universel" in his "Crise de l'État moderne." See also on this point, Bluntschli, "Politik," bk. X, ch. 3.

secures more than its rightful proportion, sometimes the other.

Views of Lecky and Mill

"The importance of providing some representation for minorities," observes Mr. Lecky, "is extremely great. When two thirds of a constituency vote for one party, and one third for the other, it is obviously just that the majority should have two thirds and the minority one third, of the representation." [1] Mill readily admits that the majority must rule in a representative system and that the minority must yield to its will; but from that it does not follow, he asserts, that the minority should have no representation at all. "In any really equal democracy," says Mill, "every or any section would be represented, not disproportionately, but proportionately. A majority of the electors would always have a majority of the representatives; but a minority of the electors would always have a minority of the representatives. Man for man they would be as fully represented as the majority and unless they are, there is not equal government, but a government of inequality and privilege — contrary to all just government, but above all contrary to the principle of democracy which professes equality as its very root and foundation." [2]

Proportional *versus* Minority Representation

Various schemes and expedients designed to give representation to minority parties or to considerable groups of electors have been frequently proposed, and some of them have been put into practice here and there, although it cannot be said that any one of these has received general approval. Where the scheme allows each party or group representation in proportion to its voting strength, we have a system of proportional representation; where it allows some representation to minorities, but not neces-

[1] "Democracy and Liberty," vol. I, p. 221. Compare also Lieber, who remarks that "essential representation requires a fair representation of the minority." "Civil Liberty and Self-government," p. 175.

[2] "Representative Government," p. 127.

sarily in proportion to their numerical voting strength, we have a system of minority representation.[1] In either case the essential feature is the formal recognition of the existence of parties or groups and the granting to each a special representation.

The "Limited Vote" Plan

Of the various schemes which have been adopted to insure representation to minorities the following are the most important:[2] *First*, the *limited vote*, according to which the voter in any electoral district from which several representatives are to be chosen is allowed to vote for a smaller number of candidates than there are places to be filled. For example, if three members are to be chosen from a constituency, the elector is allowed to vote for two candidates, so that the minority is reasonably certain of electing one of the three. This method, however, can be employed only under an electoral system in which three or more members are to be chosen from each district, and it is open to the objection that it does not allow *proportional* representation, but only *limited* representation, to minority parties. Moreover, it usually secures representation to large minorities only, and makes no provision for third parties. This method was introduced into Great Britain in 1867 for the election of members of parliament in the so-called "three-cornered" constituencies, thirteen altogether. It was abolished by the reform bill of 1885, though if the "three-cornered" system had been made general in 1867, it probably would have been readily accepted and continued as a permanent institution. The same system was employed in New York City from 1873 to 1882 for the election of aldermen, and was introduced into the city charter of Boston in 1893 for the election of the twelve aldermen, each elector being allowed to vote

[1] Proportional representation is of course minority representation, though minority representation is not necessarily proportional.

[2] The discussion given above of the several schemes of proportional representation is taken in part from an article by the author in the New International Encyclopædia.

for not more than seven of the twelve;[1] in Italy from 1882 to 1891 for the election of members of the Chamber of Deputies; and in Japan from 1889 to 1901 for the election of members of the House of Commons. It is employed at the present time in Brazil for the choice of national deputies in districts where from three to five members are chosen, and also for the choice of provincial and municipal councillors; in Italy for the election of members of provincial and municipal councils; in Portugal for the election of all deputies to the national parliament; and in Spain for the election of deputies in districts where more than two are to be chosen.

The "Cumulative" Method

Second, there is the *cumulative method*, which allows the elector to cast as many votes as there are representatives to be chosen from the electoral district and which permits him to distribute his votes among the different candidates as he pleases or to cumulate them on one or more of the candidates. Thus, if three representatives are to be chosen from a district, the elector may distribute his three votes equally among the candidates, giving one to each, or he may give them all to one, or distribute them in other ways. The advantage of this method over the preceding system is that it enables a small minority to elect at least one member by cumulating its votes on a single candidate. The chief objection to it is, that it frequently involves a waste of votes, since a popular candidate may receive many more votes than are necessary to elect him, while his less popular party associate may fail of election. It thus happens, sometimes, that where three members are chosen, the minority party elects two and the majority but one. To prevent such occurrences, strict party organization and

[1] Fairlie, "Essays in Municipal Administration," p. 132. The limited vote method is also applied to the election of sanitary trustees in Chicago, the election of police magistrates in the city of Philadelphia, and the election of supreme court judges in Pennsylvania. See Wisconsin Legislative Reference Bulletin, entitled, "Proportional Representation," compiled by Roy E. Curtis.

discipline are necessary, and the voters must be carefully instructed as to how they shall distribute their votes. Thus the system tends to multiply and strengthen the evils of party politics and in particular to perpetuate "machine" control. Like the limited vote system, the cumulative method does not necessarily secure proportional representation.

The cumulative method is now employed for the election of members of the legislative council in the Cape of Good Hope Colony, and for the election of members of the Illinois House of Representatives.[1] Under the Illinois constitution adopted in 1870 three representatives are chosen from each legislative district, and each elector is allowed three votes which he may cumulate on one candidate or distribute among the three in such manner as he pleases. In practice, the scheme has always (except in three instances) given the minority party at least one representative in each legislative district of the state. With only three exceptions also, third parties (Socialists or Prohibitionists) have always been able by cumulating their votes to elect a few representatives — the number ranging from one to five in each legislature. Sometimes, however, owing to miscalculations of party strength or defective party discipline, the majority party secures only one of three members and the minority two.[2]

The "Preferential" System

Third, there is the *preferential system*. This, sometimes known as the Hare or Andræ system, so called because proposed by an Englishman named Hare, and introduced into Denmark by Andræ, provides for the election of representatives by general ticket, and allows each elector to vote for

[1] The cumulative method is applied in a number of the American states to the election of directors in private corporations. It was also introduced into England in 1870 for the election of members of school boards.

[2] This has happened twenty-four times since the scheme went into operation in Illinois in 1871. For a careful study of the actual workings of the system in Illinois, see a monograph by Blaine F. Moore, entitled "The History of Cumulative Voting and Minority Representation in Illinois, 1870 to 1908."

one candidate or for a limited number, and also permits him to indicate his second and third choices, etc. The total number of votes cast is divided by the number of representatives to be chosen, and the quotient is taken as the amount necessary to elect any candidate. In counting the ballots only the first choices are considered, and as soon as a candidate has received a number of votes equal to the electoral quotient he is declared elected, and no more votes are counted for him. The remaining ballots which designate him as first choice are then counted for the other candidates in the order of preference, and so on down the list until the necessary number of persons have been declared elected.[1] Under this system the waste of votes is insignificant, but its complexity is an objection, and the element of chance enters somewhat into the scheme. It is inconvenient when applied to large electoral districts, because all the ballots must be counted at some central office and a recount is practically impossible. This method was advocated by John Stuart Mill in his work on "Representative Government," and has also received the indorsement of Sir John Lubbock (now Lord Avebury), Leonard Courtney, W. E. H. Lecky, and other well-known English publicists. Mill places it "among the very greatest improvements yet made in the theory and practice of government." [2] Its advantages, according to Mill, are that it secures representation, in proportion to numbers, of every division of the electoral body, not only of the leading minority party, but of every considerable minority in the constituency; second, it gives every elector

[1] See Hare, "On the Election of Representatives," ch. 4.

[2] "Representative Government," p. 136. For an analysis of Hare's scheme, see Lecky, "Democracy and Liberty," vol. I, pp. 223–225. Lecky's judgment is that Hare's scheme could be worked with little difficulty and that it "would probably materially improve the British constitution," though he doubts whether public opinion in England will ever consent to the adoption of a system which departs so widely from its traditional forms and habits. See also Benoist, "Crise de l'État moderne," pp. 127–132.

a real representative — not a nominal representative chosen by others, but one in the choosing of which he has had a part; third, it is "of all modes in which a national representation can possibly be constituted" the "one which affords the best security for the intellectual qualifications desirable in the representative"; and, lastly, it tends to elevate the character of the legislative body by securing the election of more enlightened and distinguished representatives.[1] The system as originally introduced into Denmark in 1855 has recently been modified (1901), but the essential principle is the same. It has also been lately adopted in Ireland for the election of municipal councils; in Moravia for the election of the provincial Diet; in Tasmania for the election of members for both the assembly and the legislative council; and in Finland for the election of members of the Diet. Several forms of the Hare system exist, but the general principle of them all is that described above.[2]

The "List" System

Finally, there is the *free list* system, according to which a certain proportion of voters may nominate a number of candidates not exceeding the number of places to be filled. Each voter is allowed to cast as many votes as there are representatives to be chosen, distributing them at will, but not cumulating them on any one candidate. The number of votes necessary to elect is determined by dividing the total vote cast by the number of places to be filled. The total vote cast by each party is then divided by the electoral quotient, and the result is the number of representatives to which each party is entitled. Any deficiency is supplied from those parties having the largest fractional quotas. This plan possesses the advantage of

[1] Sidgwick criticises the scheme on the ground that "no satisfactory method has been devised for selecting the particular votes that are to count for any candidate who has votes in excess of the required quota." "Elements of Politics," p. 398.

[2] Roy E. Curtis, "Proportional Representation," pp. 17–19. For an analysis of the Tasmanian system, see L. E. Aylesworth, "American Political Science Review," vol. II, pp. 587–590.

economy and secures proportional representation. This system was introduced into Cuba in 1908 for the election of representatives in the national congress and for the election of members of provincial and municipal councils. It has also been recently introduced into Norway for the election of municipal councilors; into Sweden for the election of members of the Diet and members of county and borough councils; and into the Swiss cantons of Basel-Stadt, Berne, Fribourg, Geneva, Neuchâtel, Schwyz, Solothurn, Ticino, and Zug for the election of members of the cantonal legislatures and in some cases for municipal and communal councilors. It was also introduced in the German kingdom of Würtemberg in 1907 for the election of members of the Diet and of members of municipal councils in cities having a population of ten thousand or over. In a form slightly different from that described above it has existed in Belgium since 1899 for the election of members of both chambers of the Belgian parliament; and in a still different form it was introduced into Japan in 1900, in place of the system that had existed there since 1889. Oregon is the first of the American states to take steps toward introducing a system of real proportional representation. (The Illinois system, as stated, does not provide proportional, but only minority, representation.) By a constitutional amendment adopted in 1908 the legislature is permitted to adopt a system of proportional representation, if it sees fit, for all plural elective bodies. Projects for electoral reform, including proportional representation schemes, have recently been proposed and considered in Saxony, Holland, England, and France.[1]

The "list" system is believed to be well adapted for use in the United States because of its simplicity, its adapta-

[1] For a summary of the proportional representation systems recently introduced into Switzerland, Japan, Würtemberg, Norway, Sweden, Tasmania, and Cuba, see an article by L. E. Aylesworth in the "Political Science Review," vol. II, pp. 585–591.

bility to large constituencies, its direct recognition of the party system, and because it may be employed effectively with the Australian ballot.[1] Moreover, of all the systems yet devised, it secures, as Mill has shown, the fairest and most accurate distribution of seats among the various parties or groups within the state.

Objections to the Principle of Proportional Representation

The spread of the system of proportional representation during the last ten or fifteen years has been very encouraging to its advocates, but as yet it has not made good its claim to general acceptance. It is advocated by some visionary persons as a remedy for all the ills of society; and the more ultra democratic element of the population demand it for the reason that it is a step in the direction of a more perfect democracy. Many able writers, however, condemn the principle of minority representation and maintain that the majority system is the true principle and is liable to fewer dangers. Sidgwick, for example, points out two "serious objections" to the system of minority representation. In the first place, the giving of representation to groups as such involves the loss of a valuable protection against demagogy by removing the "natural inducements which local divisions give for the more instructed part of the community to exercise their powers of persuasion on the less instructed." In the second place, representation of groups, he says, "will inevitably tend to encourage pernicious class legislation." In the third place, it will tend to reduce the standard of efficiency in the legislature by securing the election of men who represent one set of interests or opinions rather than all of them. "We want for legislators," says Sidgwick, "men of some breadth of view and variety of ideas, practiced in comparing different claims and judgments, and endeavoring to find some compromise that will harmonize them as far as possible," which can hardly be secured under a system

[1] Curtis, *op. cit.*, p. 27. For the draft of a proposed law embodying the principles of the "list" system, see Commons, "Proportional Representation," pp. 119–122.

in which the community is not locally divided for electoral purposes.[1] "To establish the system of proportional representation," says Esmein, "is to convert the remedy supplied by the bicameral system into a veritable poison; it is to organize disorder and emasculate the legislative power; it is to render cabinets unstable, destroy their homogeneity and make parliamentary government impossible." If applied to parliamentary elections, logic and consistency, he goes on to say, require that it shall be applied to the election of executives and administrative officers, and this is but the entering wedge to anarchy.[2]

VII. REPRESENTATION OF INTERESTS

Early Ideas

The idea that not only every political party but also every class, profession, and important economic and social interest in the state should be separately represented in the legislative branch has been advocated by some writers and publicists. Indeed, this principle was the distinguishing characterictic of the representative system during its early stages. In the representative systems of the medieval period, each of the three estates — nobility, clergy, and commons — had its own distinct representation. In some states, notably Sweden, the idea was carried still further, representation being allowed to each of the four orders into which the population was divided, namely, the nobility, the clergy, the townspeople, and the peasant class — a system which survived until 1866 and was also in force in Finland.

The Prussian and Austrian Systems

The system which has prevailed in Prussia since 1850, in Saxony, and in the German municipalities generally, by which the voters are divided into three classes according to the amount of taxes they pay, each class choosing one third of the members of the electoral body in each dis-

[1] "Elements of Politics," p. 396. [2] *Op. cit.*, p. 247.

trict, represents an attempt to give distinct representation to social and economic interests.[1]

Class Representation

Until recently the voters in Austria were arranged in five classes, the great landowners, the cities, the chambers of commerce, the rural communes, and a general class, each parliamentary constituency being composed wholly of one or another of these classes, never partly of one and partly of another. The parliamentary seats were so distributed among the five classes that eighty-five members were elected by the great landowners, one hundred and eighteen by the cities, twenty-one by the chambers of commerce, one hundred and twenty-nine by the rural communes, and seventy-two by the general class. This was a survival of the medieval system of estates, and was wholly out of harmony with twentieth century notions of representative government.[2] With a few important exceptions the system of class representation as applied to the constitution of lower chambers has disappeared with the advance of democracy, and survives to-day only in the constitution of the upper chambers of a few European parliaments.[3]

[1] Lowell, "Government and Parties in Continental Europe," vol. I, p. 304; Prins, "La Démocratie et le Régime parlementaire," ch. 10; Bluntschli, "Politik," pp. 453–454, and Combes de Lestrade, "Les Monarchies de l'Empire allemand," bk. V, ch. 1. It has sometimes happened that a single wealthy individual constituted the first class in an election district, three others constituted the second class, and the four together were able to outvote three or four thousand electors in the third class. Schierbrand, "Germany," p. 74.

[2] By a constitutional amendment adopted in 1907 the five-class system of voting was abolished and practically universal suffrage established for the election of all representatives. Each province is divided into election districts, from each of which, with a few exceptions, a single member is chosen. See Dodd, "Modern Constitutions," vol. I, p. 77. For an account of the system superseded, see Lowell, "Government and Parties in Europe," vol. II, pp. 87–89.

[3] Compare Lecky, "Democracy and Liberty," vol. I, p. 220.

The Austrian House of Lords contains a certain number of members who represent the landowners of the empire, a certain number who represent the church, and a certain number who have distinguished themselves in the fields of science and art. The same is true to a less extent of the Hungarian Table of Magnates. The Italian senate contains certain representatives of the army and navy, representatives of the largest taxpayers and hence of the wealth of the kingdom, and representatives

Nevertheless, there are many respectable writers who maintain that the representation of classes, professions, and interests is more in accord with the spirit of true democracy than the system which bases representation on mere numbers alone. A legislative body, said Mirabeau ought to be a sort of reduced portrait of all the varied interests of society. It should reflect the aspirations and opinions of all the different classes of the nation somewhat as a topographical chart shows the configurations of the soil. Lord Brougham in his work on the British constitution affirmed it to be a principle which ought to govern in the distribution of representation, that every class and interest in the community should be represented. "Suppose," he said, "there were one important branch of trade confined to a single district and the number of inhabitants in that district did not warrant its returning a deputy with a view to population; still it should be represented with a view to the trade driven by it. So, important professions should be represented, and important classes of properties." The English system, continues Lord Brougham, "sins grievously against this canon, since it recognizes but one test, the ancient distribution of men into towns." [1]

of the Royal Academy of Science. The Spanish senate is composed of one hundred and eighty members, of whom thirty are chosen as follows: one member by the clergy of each of the nine archbishoprics; one by each of the six royal academies; one by each of the ten universities; five by the economic societies of the Friends of the Country. The remaining one hundred and fifty are chosen by electoral colleges composed of members of the provincial deputations and of representatives chosen from among the municipal councilors and largest taxpayers of the towns. This chamber more nearly than any other represents the various interests of the state rather than the population or political divisions.

[1] Works, vol. XI, pp. 74, 95. Some writers have proposed that certain of the great industries of the state should be given separate and distinct representation, particularly agriculture, manufacturing, and commerce. The *Acte additionnel* of France of 1815 (art. 33) declared that "industry and the commercial and manufacturing interests should have special representation." The eminent German publicist Robert von Mohl suggested that society should be classified as landowners, agriculturists, merchants, shippers, and manufacturers, and each class given representation in pro-

Advocates of "Professional Representation"

Among other authorities who have defended the principle of "professional" or class representation may be mentioned the French writers Duguit,[1] Prins,[2] De Greef,[3] Charles Benoist,[4] La Grasserie,[5] the Austrian publicist Albert Schäffle, and the Greek scholar Saripolos, the author of an exhaustive study of the subject of proportional representation.[6] M. Duguit maintains that the expression of the general will (*volonté générale*) can only be effectually secured through the representation of the various groups whose opinions go to make up the general will. No legislature, he affirms, is therefore truly representative of the country unless it represents the two great constituent elements of the state, individuals and groups of individuals. "All the great forces of the national life," Duguit continues, "ought to be represented, — industry, property, commerce, manufacturing, professions, etc." [7] The system of professional representation, he argues, can be defended on the same ground as proportional representation for political parties; in the one case it is representation of groups politically organized; in the other, representation of groups differentiated for social or economic purposes.[8]

portion, first to its numerical strength, and second to its importance in its state. Religious and political organizations as well as labor organizations, associations of manufacturers, employers' associations, etc., should be allowed to choose their own representatives.

[1] In his "Droit constitutionnel," sec. 57 (1907).

[2] "Le Démocratie et le Régime representatif" (1889).

[3] "La Constituante et le Régime representatif" (1892).

[4] "Les Sophismes politiques de ce Temps" (1893), also his "Organisation du Suffrage universel" (1896), and his "Report of the Committee of Universal Suffrage," made to the French Chamber of Deputies in 1905 ("Jour. off. Doc. Parlem." 1919).

[5] "Revue politique et parlementaire," vol. III, p. 253.

[6] "La Démocratie et l'Élection proportionnelle," 2 vols. (1889).

[7] "Droit constitutionnel," pp. 368–371.

[8] *Ibid.*, p. 359. See also on this point Benoist's "Crise de l'État moderne, de l'Organisation du Suffrage universel," pp. 250 ff., where a unique project for a system of proportional representation in France is fully discussed. Commons, in his work on "Proportional Representation," advocates the principle of the representation of interests. With regard to the interests of labor, for example, he

Objections to Representation of Classes or Interests

A strong opponent of the principle of representation of interests is the French scholar, Esmein, who characterizes it as "an illusion and a false principle, which would lead to struggles, confusion, and even anarchy." Proportional representation, Esmein maintains, whether of political groups or of social or of professional classes, is inconsistent with the principle of national sovereignty, since each group represented in the legislature would possess a fraction of the sovereignty. "*Le principe de la souveraineté nationale exclut donc logiquement*," he says, "*dans le suffrage politique, ce qu'on appelle la représentation des intérêts.*"[1] It is proper, however, says Esmein, that the great economic interests of the country and the important professional groups should be able to make known to the legislature their views through assemblies which represent them and which are elected freely by them. But these assemblies should be merely advisory or consultative. They should be a means of enlightening the legislative assembly, but should not have the right to participate in the exercise of the sovereignty of the state.[2]

There is also good reason for believing that a system of class representation or representation of interests would tend to lower the character of the legislature, since each member would in some measure be the exclusive represent-

asserts that if the labor unions could combine throughout the nation and elect members of Congress who would represent them as a body, just as they select the officials of their own organizations, their interests would be more effectually cared for by the national lawmakers. "As it is," he continues, "they are forced into artificial territorial divisions and are compelled along with the whole of the electorate to submit to the candidates who appeal to the more ignorant, thoughtless, prejudiced, and easily influenced masses."

[1] "Droit constitutionnel," 3d ed., p. 202. M. Duguit answers this objection and undertakes to show that proportional representation is entirely compatible with an undivided sovereignty, *op. cit.*, p. 358. Benoist admits that the principle of the representation of interests is incompatible with national sovereignty, but he is willing to sacrifice the latter for the former. See his "Organisation du Suffrage universel" (1897), pp. 30–31.

[2] *Ibid.*, p. 205.

ative of particular interests or opinions rather than the representative of the interests of the state as a whole.[1] A legislative assembly composed of so many elements would tend to become a debating society instead of a lawmaking body, and its efficiency would be diminished in proportion to the number and variety of interests represented. One of the sources of strength in the governments of Anglo-Saxon countries has been the freedom of their legislative assemblies from the presence of numerous unstable and dissolving groups with their inevitable dissensions and deadlocks.[2] Finally, the organization of the electorate upon the basis of class distinctions, whether economic, social, or professional, would inevitably tend to multiply artificial distinctions, divide the population into groups, array each against the others, and accentuate class antagonism generally. These evils in Austria led to the abolition of the class system in that country in 1907, and they are the source of widespread and increasing popular discontent in Prussia to-day.

VIII. BEGINNINGS OF THE REPRESENTATIVE SYSTEM: EARLY IDEAS

Principle of Representation Unknown in Ancient Times

Montesquieu observed that the ancients had no notion of a legislative body composed of the representatives of the people.[3] The idea in its true sense is distinctly modern. In the states of antiquity the legislative power was not delegated to representative bodies, but was exercised by

[1] Compare Sidgwick, "Elements of Politics," p. 395; and Bluntschli, "Politik," pp. 447–456.

[2] "Imagine a legislature," says Bradford ("Lessons of Popular Government," vol. II, p. 170), "made up of distinct groups of Republicans, Democrats, Socialists, woman suffragists, labor men, prohibitionists, religious fanatics, all perfectly determined that nothing should be done unless their special objects were provided for. Would the lobbying and logrolling be any less than now, or would the strength of the groups be any less made use of by designing men?" Compare also Sidgwick's views of a legislature made up of "total abstainers, anti-vivisectionists, anti-vaccinationists, and the like" ("Elements of Politics," p. 396).

[3] "Esprit des Lois," bk. XI, ch. 8.

kings or by the people themselves in primary assemblies. The historian Freeman, in speaking of the governments of the leagues of ancient Greece, said that "the ancient world trampled on the very verge of representative government without actually crossing the boundary"; that in ancient Greece the assembly which acted upon proposed laws and gave them their sanction was composed of the freemen themselves meeting in their personal capacity, and that representation in the adoption and passage of laws was unknown.[1]

Genesis of the Representative System in England

The beginnings of the modern representative system[2] are found in the folkmoots of the early Teutons of Germany. These were assemblies of the natural leaders of the tribe, who determined the more important questions of common interest to the tribe. The Witenagemot of early English history was the assembly out of which in the course of time the first representative legislature known to history was evolved. Not a representative body at first — at least not in the modern sense — it came in time, under another name, to contain a certain number of members who possessed the true representative character. At first chosen probably by the sheriffs of the counties, they came eventually to be elected by the freeholders. Under Simon de Montfort in the thirteenth century representatives from the boroughs were added, and finally, by the end of the century the assembly had come to possess all the elements which enter into the constitution of the English Parliament to-day. The clerical element also was represented, so that the Parliament was indeed the assembly of the representatives of the three estates of the realm — the nobility, the commons, and the clergy. Early in the four-

[1] "History of Federal Government," ch. 2.

[2] "The idea of representation," says Rousseau, "is modern; it comes to us from the feudal governments, from that iniquitous and absurd government under which the human race was degraded and where the name of man was a dishonor. In the ancient republics and even in monarchies the people never had representatives; the very word was unknown." "Contrat social," bk. III, ch. 15.

teenth century the division into two houses was effected, and the process of evolution was complete.

On the Continent

On the continent of Europe the development of representative institutions came later, was much slower of growth, proceeded with less continuity and upon somewhat different lines. In the government of the continental cities of the Middle Ages the principle of representation played some part, but it was crude and imperfect. It was representation of the nobility, or of the trade guilds, or of other classes or organizations, rather than of the people. In the Cortes of Castile and of Aragon in the twelfth century we have a legislative assembly containing representatives of the cities. It was, in fact, the growth of cities during the Middle Ages that gave a powerful impetus to the development of the representative principle by the demand which they made for representation in the national assemblies. In France the beginnings of the representative system are found in the meeting of representatives of the three estates, the nobility, the clergy, and the townspeople in a general parliament in 1302. At first summoned by the king for advice and information, it soon became an established principle that no taxes could be levied without the assent of the three estates.[1] Meetings of the states-general of France took place at irregular intervals for several hundred years, after which the practice of summoning them ceased until the Revolution. The Revolution abolished the system of representation by estates and established a system of national representation.

In Germany, the system of representation by estates grew up in the thirteenth and fourteenth centuries along somewhat the same lines as in France. It was characteristic of the system in the Middle Ages that it was representation of special classes or interests such as the nobility,

[1] Bluntschli, "Allgemeines Staatsrecht," p. 44. On the development of the representative principle in Europe, see Bluntschli, bk. II, ch. 1; also Jellinek, "Recht des mod. Staates," bk. III, ch. 17.

the clergy, the townspeople, etc., rather than representation of the people as a whole. The organization of society in the Middle Ages, in fact, consisted largely of closely differentiated social groups and classes as well as political groups, and it was a part of the political science of the time to allow each class distinct representation as such; and the idea survives to-day in the constitution of many second chambers, which represent to a large extent the privileged or conservative elements in monarchical states and political units in federal states.[1] In the medieval system the church was represented equally with the nobility, the cities, and the country. In practically all countries the church as such has lost its representation, though the idea still survives in the constitutions of a number of European states which allow certain high ecclesiastical functionaries seats in the national parliament.

Characteristics of the Medieval System of Representation

For a long time the deputies of each estate were separately summoned and often sat in different chambers and voted separately. Thus it came about that in the place of single or double-chambered assemblies there were sometimes three chambers and sometimes four. The national parliament of Sweden, until comparatively recent times, consisted, as has been said, of four chambers, representing the nobility, the clergy, the bourgeoise class, and the peasant class.[2] Under the medieval system the deputy received a commission from his constituency and often bore instructions as to how he should vote. Usually he had only a specific power of attorney to remedy certain grievances and only rarely a general power of legislation.[3] Nowhere outside of England, indeed, did the deputies chosen by the

[1] Compare Crane and Moses, "Politics," p. 164.

[2] This system was not abolished until 1866. See Dareste, "Constitutions modernes," vol. II, pp. 39–42.

[3] Compare Jellinek, "Recht des mod. Staates," pp. 556–558; Bluntschli, "Allgemeines Staatsrecht," p. 50; Stubbs, "Constitutional History of England," vol. III, p. 424; Sidgwick, "Development of European Polity," ch. 21, especially p. 302.

estates become representatives of the country at large with general powers of legislation.[1]

As Lord Brougham has well said, the ancient and medieval representative was a delegate appointed to meet with other delegates and to declare the will of the community, but not to consult for the good of the whole. He was like an ambassador sent to treat with ambassadors sent by other states. He was not a representative sent by one portion of the community to consult with the representatives of other portions of the same community and to devise the measures best adapted for securing the interests of the whole. On the contrary, he was an agent commissioned to watch over the separate, independent, and possibly conflicting interests of his principal. In no other sense had the delegate a truly representative character.[2]

IX. THE MODERN IDEA OF REPRESENTATION; INSTRUCTED VERSUS UNINSTRUCTED REPRESENTATION

Passing of the Estates System

It was not until the eighteenth century that the estates system on the continent of Europe gave way to a truly national system of representation; and, indeed, in some instances the old system survived until late in the nineteenth century.[3] The transformation was fairly complete

[1] Lieber, "Civil Liberty and Self-government," p. 164.

[2] "The British Constitution," Works, vol. XI, p. 30. "The estates of the Middle Ages," says Lieber, "consisted of deputies strictly instructed, limited, and fettered; sending for new instructions on each new question which might turn up; jealously, often hostilely, extorting from one another; granting and demanding, like separate sovereigns; little concerned about the advantage of the other parties or general justice and universal fairness; treating as now a congress of universal plenipotentiaries, sent from various independent nations, would do but upon no broad or social and mutual principle." "Political Ethics," vol. II, p. 317. See also Bornhak, "Das ständische System," in his "Allgemeine Staatslehre," Zweiter Abschnitt, Abtheilung III, sec. 1. The medieval system of representation by estates, remarks Bluntschli, was not *Volksvertretung* but *Volksspaltung*. "Politik," p. 451.

[3] In the German kingdom of Würtemberg, for example, traces of it lasted until the year 1907. Cf. De Lestrade, "Les Monarchies de l'Empire allemand," p. 167.

in England by the middle of the sixteenth century,[1] but it did not come in France until the Revolution, when the states-general declared themselves to be the representatives of the nation. The modern idea was embodied in the French constitution of 1791, which declared that the deputy should not be the representative of any particular department, but of the entire nation and that no instructions should be given him.[2] This principle is expressly asserted in the constitution of the German Empire, which declares that members of the Reichstag are representatives of the whole people and are not bound by propositions and instructions.[3] It is also embodied in the present electoral law of France,[4] in the electoral law of Austria, and in the constitution of the Swiss Confederation.[5]

Modern Representative not the Mere Deputy of a Particular Class

This represents, we believe, the true idea of the office of the representative. He ought not to be considered the mere delegate of an estate or class, or of any group, organization, or interest, nor the plenipotentiary of any local government, but the representative of the state and of the people composing it. "He represents the people of the whole community," as Lord Brougham has remarked, "exercises his own judgment upon all measures, receives freely the communications of his constituents, is not bound by their instructions, though liable to be dismissed by not being reëlected in case the difference of opinion between him and

[1] Hallam, speaking of a debate in the English Parliament in 1571 on the proposed abolition of an old law requiring members to be resident burgesses, said: "This is a remarkable and perhaps the earliest assertion of an important constitutional principle that each member of the House of Commons is deputed to serve not only for his constituents, but for the whole kingdom; a principle which marks the distinction between a modern English Parliament and such deputations of the estates as were assembled in several continental kingdoms; a principle to which the House of Commons is indebted for its weight and dignity, as well as its beneficial efficiency, and which none but the servile worshipers of the populace are ever found to gainsay." "Constitutional History," vol. I, p. 362.

[2] Constitution of 1791, title III, ch. 1, sec. 3, p. 7.

[3] Reichsverfassung, art. 29.

[4] Law of Nov. 30, 1875, sec. 13.

[5] Art. 91. See also Duguit, "Droit constitutionnel," p. 308.

them is irreconcilable and important. The people's power being transferred to the representative body for a limited time, the people are bound not to exercise their influence so as to control the conduct of their representatives, as a body, on the several measures that come before them." [1] The same view of the office of the representative is held by Bluntschli. The modern representative, he declares, is a state representative, not the representative of any person, corporation, or group, and his duty is a state duty. He is not bound, Bluntschli adds, by the instructions of his constituency nor compelled to answer to them for his conduct. He is something more than a mere commissioner to register the mandates of his constituency and liable to be recalled in case he refuses to do so. On the contrary, he possesses full liberty of thought and action, and the right to interpret for himself the common need and the common consciousness without restraint upon his intellect or conscience.[2]

A Person chosen to act freely for the People as a Whole

An able defense of the principle of uninstructed representation is made by the French writer Esmein, who defines a representative as one who, within the limits of his constitutional powers, has been chosen to act freely and independently in the name of the people. He must have full independence of judgment and action, for, if his acts are determined in advance for him by legal rules or obligatory instructions, he is not a representative but a mere delegate or *mandataire* of the electors. Not only, declares Esmein, has a constituency no right to recall a representative, but it cannot limit his powers by instructions or compel him to act in a certain manner upon pain of having his acts nullified. The *mandat imperatif* is not only contrary to the principle of representative government, but is no less contrary to the

[1] "The British Constitution," Works, vol. XI, p. 94.

[2] "Allgemeines Staatsrecht, pp. 54–55. For a comparison of the medieval and modern ideas of representation, see Bluntschli, *ibid.*, pp. 50–54. See also Bornhak, "Allgemeine Staatslehre," pp. 94–114.

principle of national sovereignty.[1] Edmund Burke, we believe, expressed the true view of the office of the representative when he said that he owed his constituency both industry and judgment, and when he sacrificed these to the opinion of the constituent, he betrayed rather than served him. "The representative," he declared, "should be a pillar of state, not a weathercock on the top of the edifice exalted for his levity and versatility and of no use but to indicate the shiftings of every fashionable gale." [2]

[1] "Droit constitutionnel," pp. 66, 209, 249. Compare also Lieber, who observe that the "true character of representative government does not admit of mandatory instructions to the representative, for it makes of him a mere deputy who ought to have his instructions from the beginning." "Political Ethics," vol. II, pp. 325–330. Lord Brougham dwells upon what he calls the inconsistency and absurdity of a legislative body meeting to vote as they have been ordered to vote, and the uselessness of selecting men to perform the mechanical task of registering the declared will of a constituency. If, he declares, they must vote according to instructions, there is no need for their meeting at all, since a clerk could just as well record and publish the result. Discretion, ability to transact business, probity, respectability, station, and fitness are unnecessary in a representative who is merely a speaking trumpet for the people. *Op. cit.*, p. 36.

[2] See his address to the electors of Bristol, 1780, in which he defended his action in disregarding their instructions. "The Parliament," he declared, "is not a congress of ambassadors from different and hostile interests, which interests each must maintain as an agent and advocate against other agents and advocates. But Parliament is a deliberative assembly of one nation, with one interest, that of the whole; where not local purposes, not local prejudices, ought to guide, but the general good resulting from the general reason of the whole. You choose a member, indeed, but when you have chosen him, he is not a member of Bristol, but he is a member of Parliament."

For another criticism of the principle of instructed representation — the *mandat imperatif* of the French — see St. Girons, "La Séparation des Pouvoirs," pp. 160–165. By his vote, observes St. Girons, the elector transfers to the representative all the power he possesses and cannot therefore share with him the power of legislation. Every instruction, therefore, should be pronounced null and void either by the legisture or the judiciary, and a candidate who promises to obey the orders or instructions of his constituency when they are contrary to the conclusions of his own judgment and conscience ought to be defeated. French law, as stated above, declares every *mandat imperatif* to be null and void and releases the deputy from all obligation to obey it. Deputies have been chosen in France subject to certain mandates, but the chamber has always refused to take notice of them. See Duguit, "Droit constitutionnel," pp. 307–308.

Should the Representative be subject to Instructions

The doctrine of national uninstructed representation as set forth above represents, we believe, the judgment of the great majority of the ablest political writers and publicists.[1] Whether a member of the legislature should be bound by the instructions of his constituents, that is, whether his office should be restricted merely to ascertaining and registering their sentiments, somewhat like that of a delegate or an ambassador to a congress; or whether he should himself judge for his constituents what ought to be done and act according to his own convictions independently of instructions, are questions upon which people have differed ever since the principle of representation became an established fact. Although these questions, as John Stuart Mill observed, belong to the domain of political ethics rather than to political science or constitutional law,[2] yet they have a direct bearing on the subject here under consideration and may well receive some attention. In attempting to answer them we shall do well to follow Francis Lieber's suggestion that a distinction should be drawn between the position of the representative who is popularly elected and the representative who, like senators in federal states, is chosen by legislative bodies or other political organizations.[3]

[1] In addition to those quoted above in support of the principle of uninstructed representation, see Blackstone, "Commentaries," bk. I, ch. 1; Montesquieu, "Esprit des Lois," bk. XI, ch. 6; George Cornwall Lewis, "Government of Dependencies," p. 49; Lieber, "Political Ethics," vol. II, pp. 317, 326, 334. Rousseau, however, maintained that there could be no such thing as a representative in the sense described above. "The deputies of the people," he declared, "are not and cannot be its representatives; they are only its commissioners, they can conclude nothing definitely. Any law which the people has not ratified is null; it is no law." "Contrat social," bk. III, ch. 15. For further discussion of the modern principle of representation, see Esmein, *op. cit.*, pp. 207–209; Jellinek, "Recht des mod. Staates," bk. III, ch. 17; Bluntschli, "Allgemeines Staatsrecht," bk. II, ch. 2; Mill, "Representative Government," chs. 12–13; Laveleye, "Le Gouvernement dans la Démocratie," vol. II, bk. VIII, ch. 14; Riecker, "Die rechtliche Natur der modernen Volksvertretung" (1893); Dandurand, "Le Mandat imperatif" (1891); Briol, "Du Mandat législatif"; Duguit, "Droit constitutionnel," secs. 52–53; also his "L'État, Les Gouvernants et les Agents," ch. 2.

[2] "Representative Government," p. 216. [3] "Political Ethics," vol. II p. 307

Argument in Favor of Instruction

In each case the relation between the representative and those who elect him is somewhat different, and the right of instruction may be viewed in a different light. With regard to the duty of the representative who is chosen directly by the people, it is held by some high authorities that, in order to be what the word implies, namely, the mouthpiece of those for whom he speaks, he ought simply to register their will rather than his own whenever it can be accurately made known to him, or he ought to resign and make way for some one who more truly represents their sentiments. Otherwise how can he be said to be a servant of the people and how can he speak for them as they themselves would speak in his place?

Practical Difficulties in the Way

But those who adopt this view ignore the practical difficulties in the way of its full realization. The will of the people cannot always be ascertained and made known to the representative, for there are rarely any organs for collecting their sentiments on the multifarious questions that are presented to the legislature for consideration. Public opinion, indeed, can only be ascertained by the sifting process of a representative system. What is often taken for public opinion is in fact but the momentary impulse of excited masses and not the calm judgment of reflecting individuals. Where, however, the representative has pledged himself before the election to act in a certain manner, the question of his duty to obey instructions is somewhat simplified, for then a departure therefrom would be a breach of honor and of good faith such as no representative can afford to be guilty of. It is a grave question of public policy, however, whether a constituency should make it a condition of election that a candidate should adhere to certain opinions laid down for him by themselves.[1]

[1] Regarding ante-election pledges, John Stuart Mill expresses an unfavorable opinion. Pledges should not be required, he says, "unless from unfavorable social circumstances or faulty institutions, the electors are so narrowed in their choice as to be compelled to fix it on a person presumptively under the influence of partialities

Representative ought not lightly to disregard the Wishes of his Constituency

Holding the view that the representative should possess full independence of judgment and action, unfettered by instructions, we do not, however, take the position that the opinions of the electors are to be lightly ignored. A people cannot be governed in opposition to their primary notions of right even when those notions are sometimes erroneous. The representative who endeavors faithfully to reflect the will of his constituency will not recklessly disregard their sentiments, but will, so far as is consistent with his best judgment and sense of duty to the nation, give effect to them. We agree with Burgess that the views of a constituency should always be taken into account as contributing to the make-up of the consciousness of the state, but that the will of a constituency has no place in the modern system of legislative representation.[1] The essence of representation, as Lord Brougham once said, is that the power of the people should be parted with and given over for a limited period to the deputy chosen by them, and that he should perform that part in the government which, if it were not for this transfer of authority, would be performed by the people themselves. But it is not representation if the constitutents so far retain control over their representative as to act for themselves. They may communicate with him; inform him of their wishes, opinions, and circumstances; pronounce their judgments upon his public conduct; they may even call upon him to follow their instructions and warn him that if he disobeys they will no longer trust him or reëlect him to represent them. But he is to act — not they.[2]

hostile to their interest." "Representative Government," pp. 227–228. On the subject of pledges see also Lieber, "Political Ethics," vol. II, bk. VI, ch. 3. Lord Brougham observes that pledges were common in Great Britain in former times, though occasionally candidates refused to make promises, as did Macaulay, in 1832, when he declared to a political committee that he would give no pledges under any circumstances.

[1] "Political Science and Constitutional Law," vol. II, p. 116.

[2] "The British Constitution," Works, vol. XI, pp. 35–37.

Judgment of Representative ought to be respected by his Constituents

The representative under normal conditions will be a wiser person than the average of those whom he represents; he will possess the advantage of experience in statecraft, and probably superior knowledge and ability; and his own judgment, therefore, ought to be regarded with respect by his constituents.[1] He ought not to be obliged to conform his action to their opinions or to vote in a manner which his own judgment, aided by discussion and argument, fully condemns. It is seldom the case, observes an able writer on this subject, that the people are capable of judging wisely in matters of legislation; they may express intelligent opinions on the larger questions of public policy, but rarely on matters of detail.[2] Superior powers of mind and profound study are of no use, as Mill has pointed out, if they do not sometimes lead a person to different conclusions from those which are formed by ordinary minds without study; and if it be an object to possess representatives in any intellectual respect superior to average electors, he continues, it must be counted upon that the representative will sometimes differ in opinion from the majority of his constituents, and that when he does so, his opinion will most frequently be right. It follows that the electors will not do wisely if they insist on absolute conformity to their opinions as the condition of a representative's retention of his seat.[3]

[1] "The great beauty of the representative system," said Mr. Macaulay, speaking in 1832, "is that it unites the advantages of popular control with the advantage arising from a division of labor; just as a physician understands medicine better than an ordinary man, . . . just as a shoemaker makes shoes better than any ordinary man, a person whose life is passed in transacting affairs of state becomes a better statesman than an ordinary man. . . . My opinion is that electors ought at first to choose cautiously, then to confide liberally; and when the term for which they have selected their member has expired, to review his conduct equitably and to pronounce on the whole when together."

[2] St. Girons, "La Séparation des Pouvoirs," p. 163.

[3] "Representative Government," ch. 12. "When the difference between the judgment of the electors and the representative is not fundamental, the elector may well consider," says Mill, "that when an able man differs from him there is at least considerable chance of the elector being in the wrong; and, even if otherwise, it is worth considering whether he may not give up his opinion for the sake of the

New Democratic View of Office of Representative

But, as Mill observes, democracy is not favorable to the reverential spirit. In modern democratic states the opinion prevails among the masses that they are as well qualified to judge of the common needs as those whom they have chosen to speak for them. There is, in short, a tendency everywhere to-day to regard the office of representative in a very different light from that described above. His function, according to the new view, is not to interpret the common good as his conscience and better judgment dictate, but to register the popular interpretation whether his conscience and judgment approve or not.

Instruction of United States Senators

In the United States the doctrine of instruction has for the most part related to the right of the state legislatures to instruct United States senators as to how they shall vote on particular measures. With regard to representatives in Congress, the right of instruction has rarely been asserted. The latter have generally been considered as representatives of the people without any of the plenipotentiary character sometimes attributed to senators. Moreover, not being chosen by organized political bodies, as is the case with senators, there is no organization representing the people which is competent to formulate instructions. To some extent, senators, as has been intimated, resemble deputies or delegates more than representatives do, and hence the right of instruction as applied to them is more easily defended. But they are not ambassadors of the states, as was once claimed by the particularistic school of political thinkers. They do not bear commissions from the state governments; they are not paid by the states, nor can they be recalled at the pleasure of the states as would be the case if they possessed the diplomatic character. Their function is to deliberate and legislate, not to negotiate. The analogy, therefore, between the ambassadorial office and the senatorial mandate is extremely shadowy

inestimable advantage of having an able man to act for him in the many matters in which he himself is not qualified to form a judgment."

and superficial. In the case of some upper chambers in federal states, however, such, for example, as the German *Bundesrath*, the right of instruction is expressly recognized in the constitution. But in the United States, the constitution is silent in regard to the matter and the question is, therefore, an open one. In a number of instances state legislatures have passed resolutions "requesting" senators to support or oppose particular measures, and in a few instances resolutions have also been passed "instructing" them as to their duty. In some cases the instructions have been obeyed and in others disregarded.[1]

Argument against Instructions for Senators

There is no means of enforcing such instructions if a senator chooses to disregard them, for the senatorial term is fixed by the constitution and no right of recall is recognized. On the other hand, if the instructions are to be considered morally binding so that the senator is in honor bound to resign his seat in case he cannot obey them, then the constitutional provision fixing the term is meaningless, since it is within the power of the legislature to compel the resignation of a senator by giving him instructions which his sense of honor will not allow him to obey. In such a case, the right of instruction in effect becomes a right of recall. Moreover it not infrequently happens that one or both of the senators from a state belong to a different political party from that which controls the legislature, in which case an assertion of the right of instruction would, of course, be absurd. Suppose, furthermore, the legislature should instruct the senator to advocate and vote for a measure which he believed to be clearly

[1] The legislature of Virginia in 1836 "instructed" the senators from that state to vote for the expunging resolution then before the United States Senate. The instructions were disobeyed by both Senators Benjamin Watkins Leigh and John Tyler. Leigh resigned, but Tyler retained his seat, regarding the instructions as contrary to the constitution. In 1878 the legislature of Mississippi instructed its senators to vote for the Bland Silver Bill. The instructions were disobeyed by Senator Lamar, who defended his action in a strong address to the people of the state. See Mayes' "Life of L. Q. C. Lamar," p. 234.

unconstitutional. Having taken an oath to support the constitution, he would be guilty of perjury if he violated his oath and disregarded the constitution. He is a guardian and trustee of the constitution no less than the mouthpiece of his constituency, and his obligation to the former is unquestionably higher than his duty to obey the temporary will of the body which chooses him. It would not be claimed for a moment that the legislature could instruct a senator as to how he should vote in an impeachment trial, yet the deliberations of the senate on many questions of legislative policy have a semi-judicial character, the wisdom or expediency of a particular course of action often depending upon facts and circumstances not within the knowledge of the body giving the instructions. The legislator should reach his conclusions after careful study and in the light of all the facts brought out in the course of debate, and he ought not to be subject to the instructions of a body which has not had the benefit of the knowledge which comes from discussion and elucidation. "The principle is," says Burgess, "that each senator and each representative represents the whole United States, according to his own intelligence and judgment, and that there is no constituency in the United States which can demand a control over its representative in either house of the Congress, or require his resignation." [1] The doctrine of instruction, says Lieber, is "unwarranted, inconsistent, and unconstitutional," and this must be the conclusion of every one who studies the question in all its bearings.[2]

[1] "Political Science and Constitutional Law," vol. II, p. 50.

[2] "Political Ethics," vol. II, p. 361. On the general subject of instruction, see Lieber, pp. 324–362.

CHAPTER XV

THE ELECTORATE

Suggested Readings: BENOIST, "La Crise de l'État moderne (de l'Organisation du Suffrage universel"); BLUNTSCHLI, "Politik," bk. X, chs. 1 and 2; BRADFORD, "Lessons of Popular Government," vol. I, ch. 1; COOLEY, "Principles of Constitutional Law," ch. 14; DUGUIT, "Droit constitutionnel," secs. 98–104; also his "L'État, les Gouvernants et les Agents," ch. 3; DUPRIEZ, "L'Organisation du Suffrage universel en Belgique," chs. 1 and 2; ESMEIN, "Droit constitutionnel," third ed., pp. 209–248; GUMPLOWICZ, "Allgemeines Staatsrecht," bk. I, ch. 9; LAVELEYE, "Le Gouvernement dans la Démocratie," vol. II, bk. IX; LECKY, "Democracy and Liberty," vol. I, ch. 1; also vol. II, ch. 10; MAINE, "Popular Government," ch. 1; MILL, "Representative Government," ch. 8; POSADO, "Tratado de Derecho Politico," vol. II, bk. V, ch. 6; PRINS, "Esprit du Gouvernement démocratique," ch. 3; ROUSSEAU, "Contrat social," bk. IV, chs. 2 and 3; SIDGWICK, "Elements of Politics," pp. 378–400; STORY, "Commentaries," vol. I, secs. 576–584; HELEN SUMNER, "Equal Suffrage in Colorado"; WOOLSEY, "Political Science," vol. II, pp. 110–113; 297–301.

I. THEORIES OF SUFFRAGE

Theories of the French Revolutionists

IT was a part of the French political philosophy of the eighteenth century that every citizen has a natural and inherent right to participate in the choice of his representatives. This was a logical consequence of the French conception that sovereignty is the general will and that this will cannot be accurately ascertained and expressed unless all the citizens are allowed to participate in its expression through the choice of representatives.[1]

"All the inhabitants," said Montesquieu, ". . . ought to have a right of voting at the election of representatives, except such as are in so mean a situation as to be deemed

[1] Compare Esmein, "Droit constitutionnel," p. 210.

to have no will of their own." [1] Rousseau held a similar view.[2] This doctrine was powerfully supported by Robespierre, Condorcet, Petion, Boissy d'Anglas, and other Frenchmen at the time of the Revolution. Sovereignty, said Robespierre, resides in all the people, and every citizen, whoever he may be, should have a share in the representation and the right to participate in the formation of the law by which he is bound.[3]

French Practice in the Eighteenth Century

Notwithstanding the general prevalence of this notion in France in the eighteenth century, the French constitutions of the time did not, as a matter of fact, establish the principle of direct and unrestricted suffrage. The national assembly established instead a system of indirect election based on a restricted suffrage, and it made a distinction between active and passive citizens, the latter of whom were allowed no part in choosing the intermediate electors.[4] In 1792, however, the distinction between *citoyens actifs* and *citoyens passifs* was abolished, as was also the tax qualification for voting; the age requirement was reduced to twenty-one years, and a system approaching universal manhood suffrage was substituted, though the system of indirect election was retained. The constitution of the year III (1795) reëstablished a tax qualification for voting without specifying the amount; in 1800 this was abolished and the principle of a wide suffrage reëstablished. Under the restoration, in 1814, however, France went to the extreme of requiring the payment of a tax amounting to 300 francs and the attainment of the thirtieth year of age as a condition to the exercise of the suffrage.[5] The Revolution of 1830 brought about a reduction from 300 to 200 francs in the amount of the tax contribution required of electors and the

[1] "Esprit des Lois," bk. XI, ch. 6. [2] "Contrat social," bk. IV, ch. 2.

[3] For the views of the French Revolutionary statesmen on this question, see Esmein, p. 211; Duguit, p. 691; and Bluntschli, "Politik," pp. 420–421.

[4] Constitution of 1791, Title III, ch. 1.

[5] Charter of 1814, art. 35. For a review of the history of suffrage in France, see Esmein, pp. 222–236; and Duguit, sec. 99.

lowering of the age requirement to twenty-five years for members of the lower chamber. Both during the period of the Restoration and the July monarchy, the number of electors in proportion to the population was exceedingly small, and this became the cause of widespread popular discontent. A movement for direct universal manhood suffrage became active about 1840, and it triumphed in 1848 with the establishment of the second republic, the constitution of which declared that suffrage should be direct and universal and that all Frenchmen twenty-one years of age and in the enjoyment of their civil rights should be electors, regardless of the amount of their property. This system was continued under the second empire and under the third republic, and is still in existence.

Nature of the Franchise

The French political dogma of the eighteenth century, that the right of suffrage is a gift of nature, belonging to all citizens alike, has generally been rejected as a false and pernicious principle; and no states, not even France, as we have shown, have in practice acted wholly on such a principle. The better view is that suffrage is not a natural right of all men, but a privilege granted by the state to such persons or classes as are most likely to exercise it for the public good.[1] Nearly all electoral systems have been framed on this principle, that is, they have conditioned the privilege upon a variety of considerations to be explained later. In the early stages of the evolution of the representative system the restrictions were much more general and stringent than they are to-day, and consequently the body of electors was much smaller in comparison with the whole number of inhabitants.

[1] Compare Bluntschli ("Politik," p. 421), who justly remarks: "*Aber das Wahlrecht im Staate und für Staatszwecke ist nicht ein natürliches Menschenrecht, sondern ein staatliches, vom Staate abgeleitetes, dem Staate dienendes Recht. Es besteht nicht auszer dem Staate und darf nicht bestehen wider den Staat. Nicht als Menschen sondern als Staatsbürger üben die Wähler dieses Recht aus. Sie haben dieses Recht nicht aus sich, nicht weil ihre persönliche Existenz und Entwicklung es erfordert, sondern sie haben es durch die Staatsverfassung empfangen und üben es im Dienste des Staates aus.*"

Early Restrictions

In the eighteenth century, and indeed far into the nineteenth, the exclusion of the non-property-owning classes was not considered inconsistent with the prevailing notions of popular government; and nowhere outside of France was there any considerable number of statesmen or political writers who believed that government by the masses of the people was practicable.

In England, until 1832, the parliamentary franchise was limited in the counties to freeholders whose landed property was of the annual value of forty shillings; and in the eighteenth century the value of forty shillings was many times what it is to-day.[1] In the English colonies of America freehold qualifications for voting were common in the seventeenth and eighteenth centuries, and in a number of them religious qualifications also existed. The Massachusetts charter of 1691, for example, limited the suffrage to possessors of freeholds of the annual value of forty shillings or of other estates to the value of forty pounds.[2] Likewise the early state constitutions generally restricted the right of voting to the property-owning classes. In some, like New Hampshire, Delaware, Georgia, and Pennsylvania, the payment simply of a tax was required, but in others the suffrage was restricted to owners of land of an annual value ranging in amount from three pounds in Massachusetts to fifty pounds in New Jersey.[3]

Extension of the Suffrage in the United States

With the rapid spread of democratic ideas after 1820, however, restrictions upon the suffrage began to disappear, and before the middle of the century practically the entire adult white male population was in the enjoyment of the franchise. Only one or two of the older states restricted

[1] See Rogers, "Economic Interpretation of History," p. 32.

[2] See Courtlandt F. Bishop, "History of Elections in the Colonies," ch. 2; also Lalor, "Encyclopedia of Political Science," art. "Suffrage."

[3] For a summary of the suffrage requirements in the early state constitutions, see an article entitled "The First State Constitutions," by W. C. Morey in the "Annals of the American Academy of Political and Social Science," vol. IV, pp. 20–22; also Schouler, "Constitutional Studies," pt. I, ch. 4.

the right to vote to those who could read and write, though here and there a small property qualification was required. In recent years some of the Southern states, owing to the presence of a large ignorant negro population, have restricted the suffrage to those who can read or "understand" the state constitution. In other Southern states the privilege of voting is limited to those who own a small amount of property, or pay a poll tax, or have served in the Union or Confederate armies or are descended from those who so served, or were voters in the year 1867 or are descendants of such voters.[1] Ability to read and write is a condition to the exercise of the suffrage in several of the Northern and Western states also.

Common Restrictions

In all the states citizenship of the United States or a declaration of intention to become a citizen is required[2] as well as residence for a specified period in the state and election district in which the voter offers to vote. The attainment of the twenty-first year of age is a universal requirement, and with the exceptions to be noted later the right of suffrage is generally restricted to persons of the male sex. A common requirement also is that the voter's name shall be inscribed on an electoral list, or, in popular language, he shall be "registered."

Restrictions in England

In England, as a result of successive extensions beginning in 1832, the franchise has come to embrace the mass of the adult male population, the ratio of the voters to the total population being about one to six. Practically the only classes of adult males now excluded from the franchise are

[1] For a summary and discussion of the qualifications for voting in the Southern states, see an article by the writer in the "South Atlantic Quarterly," vol. IV, no. 3. See also an article by John C. Rose in the "American Political Science Review," vol. I, no. 1.

[2] In the following states aliens who have declared their intention of becoming citizens enjoy the right of suffrage equally with citizens: Arkansas, Indiana, Kansas, Missouri, Nebraska, South Dakota, Texas, Oregon, and Wisconsin. The naturalization act of 1906, however, in order to prevent the wholesale naturalization of aliens immediately prior to elections, prohibits from voting in federal elections all persons who have been naturalized less than ninety days prior to such elections.

domestic servants, bachelors living with their parents and occupying no premises on their own account, and persons whose change of abode deprives them of a vote.[1] In the latter class are included vagrants, artisans who move about in obedience to the demands of trade, and many professional persons like teachers whose calling is such that the rule requiring twelve months' occupation often excludes them. Among the specifically excluded classes are peers (except Irish peers who are members of Parliament), aliens, idiots, paupers, convicts, persons employed by candidates, and a few public officers, such as those directly concerned with the conduct of elections. In order to exercise his privilege the name of the voter must be on a registration list, made up in the first instance by the overseers of the poor in each parish and revised and corrected by an official known as the revising barrister.

Restrictions in France

In France, as has been said, practical universal manhood suffrage now prevails except that certain individuals are excluded, such as persons convicted of crime, bankrupts, persons under guardianship, and persons in the active military or naval service.[2]

Restrictions on the Continent of Europe

The suffrage for the election of members of the *Reichstag* of the German Empire also approaches the universal manhood level, though the attainment of a more advanced age is required than in America or England, namely, twenty-five years. The franchise is restricted wholly to Germans of the male sex, while various persons are excluded, notably those under guardianship, bankrupts, paupers, persons who have lost their civil rights, and persons who are in the active

[1] Lowell, "The Government of England," vol. I, p. 213. For a clear and concise summary of the subject, see Lowell, ch. 9. In 1906, the total number of voters registered under the different franchises in the United Kingdom was 7,266,706, the total population being about 42,000,000. They were distributed among the different franchises as follows: owners, 574,827; occupiers, 6,357,817; lodgers, 226,191; freemen, etc., 57,728; universities, 45,150.

[2] The number of voters is about 10,800,000, out of a total population of about 40,000,000.

military service. The names of all voters must be inscribed on an electoral list for a certain period before the election.[1] The suffrage in the several German states varies widely, but usually it is more restricted than the imperial franchise. Such, for example, is the three-class system of voting in Prussia, according to which the voters are divided into three categories on the basis of the amount of taxes they pay, each class voting separately and choosing one third of the intermediate electors by whom the members of the *Landtag* are elected. Under this arrangement a few large taxpayers in an election district possess the same electoral power as a large number of voters who own a small amount of property. The same system is applied in choosing municipal councils in the cities and villages of Prussia.[2] Italy almost alone of the European states requires an educational qualification for the exercise of the suffrage. For the election of members of the Chamber of Deputies

[1] See the Imperial Electoral Law of May 31, 1869; Howard, "The German Empire," pp. 81–83; Lowell, "Government and Parties in Europe," vol. I, pp. 252–253. The broad suffrage established for the empire was regarded as more or less of an experiment by the founders and various devices were provided against the possible evils which it was feared would flow from the system. Such were the non-payment of members of the *Reichstag*, the holding of elections on week days instead of Sundays as is the general practice on the continent of Europe, and the denial to the large cities of their proportionate share of representatives.

[2] Recently widespread dissatisfaction, especially among the working class, has developed against the three-class system of suffrage in Prussia. On the 18th of March, 1906, an imposing demonstration in favor of universal suffrage took place throughout Prussia. In consequence, the government brought in a project for a readjustment of the electoral districts and an augmentation of the number of members of the *Landtag*, but retaining the three-class system. On the 2d of April, 1906, the Chamber rejected, by a vote of 188 to 80, a liberal proposition looking toward the establishment of a system of universal suffrage. On February 7 of the same year the *Reichstag* rejected a project initiated by the Socialists providing for an amendment to the imperial constitution establishing direct universal suffrage for all Germans, male and female alike, in all the states of the empire including Alsace-Lorraine. The government in opposing the measure maintained that the proposition was in contravention of the federal principle of the German empire. See "Revue politique et parlementaire," 1906, p. 174. Recently Würtemberg, Baden, and Bavaria have introduced systems approximating universal manhood suffrage. See Duguit, "Droit constitutionnel," p. 708.

the elector must have passed an examination on the subjects embraced in the course of compulsory education, though the examination is not required of certain classes who could obviously pass it, such as the members of learned societies, college graduates, professional men, etc.; nor of those who pay a direct tax of nineteen lire to the state or who pay rents of a certain amount.[1]

Recent Extensions in Europe

In Austria, until 1907, a complicated five-class system prevailed, according to which the voters were grouped somewhat as in Prussia on the basis of the amount of taxes they paid.[2] By a constitutional amendment adopted in 1907, however, the five-class system was abolished and virtual manhood suffrage was established for the election of all representatives to the popular chamber.[3] In Hungary, by an amendment of 1907, what amounts to virtual manhood suffrage was also established, though there are some disqualifications, notably in the case of certain public officers.[4] In Switzerland, both in the confederation and in the cantons, the suffrage is enjoyed by all males twenty years of age except the clergy, and a few other classes who are unfit. Likewise in Greece and in Spain (since 1890) virtual manhood suffrage prevails.

The Belgian System of Plural Voting

Belgium in 1893 introduced a system of plural voting. Every male citizen twenty-five years of age and a resident at least one year in the commune is allowed one vote; a supplementary vote is allowed to every man who has reached the age of thirty-five years and has legitimate offspring and pays a tax of 5 francs to the state; also to every landed proprietor twenty-five years of age the value of whose land aggregates at least 2000 francs. Two supplementary votes are allowed to every citizen twenty-five

[1] The total number of voters in Italy is about two million out of a total population of about 33,000,000. The introduction of universal manhood suffrage in Italy would increase the number of electors to about eight million. A widespread agitation in favor of a more extended franchise has recently been inaugurated in that country.

[2] Lowell, "Government and Parties in Europe," vol. II, p. 88.

[3] Dodd, "Modern Constitutions," vol. I, p. 77, note 5. [4] *Ibid.*, p. 106.

years of age who possesses a diploma from an institution of higher learning or a certificate showing the completion of a course of secondary education; or who holds or has held a public office or who practices or has practiced a private profession which presupposes that the holder possesses at least a secondary education. No one, however, may have more than three votes in the aggregate.[1]

Principle Underlying the System of Plural Voting

The Belgian system represents an effort to combine the advantages of universal suffrage with a scheme of what Sidgwick calls "weighted voting," with a view to mitigating the evils inherent in a system of universal suffrage by preventing the ignorant and uninstructed mass of the community from overriding the intelligent and capable few. It rests on the assumption that there are some individuals in the state whose votes ought to be given a greater weight in the choice of public officials than those of the rest, that while every one ought to have a vote, some ought to have more than one. It recognizes, in short, that some men are wiser and better fitted to choose, and that some men's opinions should count for more than others' in ascertaining the general will. While admitting that every honest and capable citizen should be allowed a share in choosing those who are to govern him, it denies that every one should be given an equal share, in short, that the judgment of the illiterate and incapable should count for less than that of the capable and educated voter. The Belgian system takes into consideration the elements of

[1] Constitution, art. 47. Dodd, "Modern Constitutions," vol. I, pp. 132–133; and Duguit, *op. cit.*, p. 703. For an elaborate study of the history and working of the Belgian system of plural suffrage, see Dupriez, "Le Suffrage universel en Belgique," 1901. See also Desjardines, "La Liberté politique dans l'État moderne," p. 239 *et seq.* Esmein ("Droit constitutionnel," p. 240) criticises the method of plural voting as resting on a principle which is a logical contradiction. If, he asks, its purpose is to counteract the evils incident to the incapacity of others would it not be logical to refuse entirely the electoral right to the latter? In admitting the latter to the suffrage the law recognizes in them a capacity. Then why give to others in the exercise of the same function a superior authority?

property, education, family relation, and occupation or profession in determining the weight of a man's voice in the government. It assumes that the vote of the owner of property upon which taxes are paid to the state should count for more than the vote of one who contributes nothing to its support; that the vote of the man who has added to the population and power of the community by establishing a family should be given greater weight than the vote of him who has not; and that the share of the citizen who contributes to the advancement of civilization by practicing a profession should be larger than that of a common laborer, etc.[1]

Objections to Plural Voting

The chief objection to such a system of suffrage lies in the difficulty of finding a just and practical standard or criterion by which the weight of different votes may be graduated. Any scheme for assigning different values to the votes of the property owner, the man of education, the head of a family, the professional man, etc., must be largely arbitrary. The possession of property, for example, is often the result of accident rather than of thrift, economy, or capacity, and even if it were otherwise, popular opinion is so averse to the basing of political rights upon wealth that the scheme would be hard to defend in a democracy. It is sometimes said in support of the argument that the wealthy have more interests to be protected

[1] On the subject of plural voting in general, see Benoist, "La Crise de l'État moderne," pp. 93–117. The system of plural voting was formerly employed in England in vestry elections and in the election of poor law guardians. The principle is also in effect retained in the electoral law which permits a voter to vote in two different constituencies provided he has a residence in each. For the county and university franchise residence is not necessary, and even in the boroughs where it is required it is possible for one to have more than a single residence. Moreover, since residence within seven miles of the borough satisfies the legal requirements, one who lives in the country and maintains a business office in the borough may vote in both places. For many years the abolition of plural voting has been a part of the Liberal programme, and in 1906 when the Liberal party came into power the government brought in a bill to establish the principle of "one man one vote." It passed the House of Commons but was rejected by the House of Lords. See Lowell, "Government of England," vol. I, pp. 214–215.

than the poor and should therefore be given a proportionately larger share in the choice of those who govern.[1] But to this it may be replied that the power of self-help among the rich is correspondingly greater, and hence the need of state protection is less than in the case of the poor. Weighted voting for the wealthy, moreover, tends toward the establishment of class government and government by the wealthy few at that — the most obnoxious of all forms of government. The nature of one's profession or occupation is regarded by some as a fairly just and practical test for determining the weight of a vote. Thus it is said, an employer is likely to possess more ability and intelligence than an employee; a banker, a merchant, or a manufacturer, more than an artisan; one engaged in a learned profession, more than one engaged in an unskilled trade; and so on.[2]

Mill's Defense of "Weighted Voting"

Thus John Stuart Mill, who was an advocate of the scheme of "weighted voting," expressed the opinion that two or more votes might properly be allowed to every person who "exercises any of these superior functions."[3] A system of plural voting in which a superior weight was assigned to the vote of the educated man was strongly

[1] Compare Sidgwick, "Elements of Politics," p. 390.

[2] Sidgwick remarks that the "employer or manager of capital has nominally far more knowledge than his employees of the conditions favorable and unfavorable to the industry that he directs; and in defending his own interests he will, to an important extent, indirectly defend the economic interests of society as regards this branch of industry."

[3] "Representative Government," Universal Library edition, p. 168. "When two persons who have a joint interest in any business," said Mill, "differ in opinion, does justice require that both opinions should be held of exactly equal value? If with equal virtue, one is superior to the other in knowledge and intelligence or if with equal intelligence, one excels the other in virtue, the opinion, the judgment, of the higher moral or intellectual being is worth more than that of the inferior; and if the institutions of the country virtually assert that they are of the same value, they assert a thing which is not true." The liberal professions, Mill observed, imply a still higher degree of instruction, and whenever a sufficient examination or any serious conditions of education are required before entering upon a profession its members should be admitted at once to a plurality of votes.

recommended by Mill as a "counterpoise to the numerical weight of the least educated." It would be a means, he argued, of offsetting the "more than equivalent evils" of a "completely universal suffrage." In any system providing a widely extended suffrage it might be wise, he said, "to allow all graduates of universities, all persons who have passed creditably through the higher schools, all members of the liberal professions, and perhaps some others who registered specifically in those characters, to give their votes as such in any constituency in which they choose to register; retaining in addition their votes as simple citizens in the localities in which they reside. All these suggestions are open to discussion as to details; but it is evident to me that in this direction lies the true ideal of representative government, and that to work toward it by the best practical contrivances which can be found is the path of real political improvement."[1] But intellectual superiority or academic training is not always a mark of political capacity. A skillful but uneducated artisan may easily possess more political insight and judgment than a schoolmaster, a physician, or other professional man of high academic training. Political privileges based on distinctions of superior intelligence are, moreover, likely to be arbitrary and invidious.

Compulsory Suffrage

The question has been much discussed whether one who possesses the right to vote ought not legally to be required to exercise it, just as the citizen is compelled to serve on juries and at times to hold certain offices. It is sometimes asserted that voting is a public service, a civic duty, for the neglect of which a penalty ought to be imposed; and that, especially in a democracy, the participation of all citizens in elections ought to be obligatory, otherwise the election returns cannot be said to represent the real will of the electorate.[2] At the present time, however,

[1] "Representative Government," p. 171.

[2] Duguit seems to take this view. See his "Droit constitutionnel," pp. 91–92.

Belgium and Spain are the only countries of importance in which the principle of compulsory suffrage has been introduced in practice. In Belgium it has been in operation for a number of years,[1] and in Spain it was introduced in 1908. The Spanish law on the subject requires all males of legal age, except judges, notaries, priests, and men over seventy years of age to vote unless absent or sick. Failure to do so is punishable by publication of the name of the delinquent as a mark of censure, by a two per cent increase of his taxes, by the loss of one per cent of his salary if he is in the employ of the state, and in case of repetition of the offense, by the loss of the right to hold public office in the future.

Objections to Compulsory Suffrage

But the principle of obligatory voting has not generally commended itself to political writers or statesmen. It assumes that voting is a public legal duty instead of a privilege or a moral duty. However reprehensible may be the conduct of the citizen who neglects his civic obligations and his public duties as a member of society, it is hardly the province of the state to punish by legal means the nonperformance of such duties.[2] The value of universal suffrage depends on its being regarded at once as a privilege and a moral duty. If it were required by law, the privilege would be exercised as a mere form and without regard to the public good, very much as it was by the *sans-culottes* of Paris, who were paid for their attendance during the French Revolution. The effect would be a marked lowering of the character of the privilege. Moreover, compulsory votes would be much more open to bribery and would soon come to be estimated by their market value.[3]

[1] Constitution of Belgium, art. 86. The French law of Aug. 2, 1875 (art. 18), establishes the principle of obligatory suffrage for the election of senators of the republic.

[2] Compare Lieber, "Political Ethics," vol. II, p. 230.

[3] Cf. Bradford, "Lessons of Popular Government," vol. II, p. 187. For a strong criticism of the principle of compulsory suffrage, see Esmein, "Droit constitutionnel," pp. 216 ff.; see also Benoist, "La Crise de l'État moderne," pp. 49–55.

II. UNIVERSAL SUFFRAGE

Suffrage regarded as a Natural Right of All Men

It is sometimes claimed, as was said in an earlier part of this chapter, that the right of the individual to participate in the choice of representatives is a right inherent in the quality of citizenship; that it is one of the natural rights of man, indispensable to his liberty, and a logical necessity if the doctrine that governments derive their just powers from the consent of the governed has any meaning. This doctrine, as we have already explained, was one of the cardinal dogmas of the French political philosophy of the eighteenth century and still has many advocates throughout the world. According to this view, the enjoyment of the franchise contributes to the dignity and self-respect of the individual, and is an agency of political education, as well as a powerful instrument for interesting the masses in public affairs and attaching them to the loyal support of the government.[1]

Universal Suffrage rejected in Practice

The doctrine that governments derive their powers from the consent of the governed has, however, always been construed in practice as having important limitations. No one, as Judge Story has well remarked, not even the most strenuous advocate of universal suffrage, has ever yet contended that the privilege should be absolutely universal; and no one has ever been sufficiently visionary to maintain that all persons of every age, degree, and character should be entitled to vote in all elections for all public officers.[2] As a matter of fact, all states, even the most democratic, restrict the suffrage to a part only of their population. Most of them deny the privilege, wholly or in part, to females, minors, insane persons, and idiots; practically all of them debar those who have been

[1] Lecky, "Democracy and Liberty," vol. I, p. 1; Laveleye, "Le Gouvernement dans la Démocratie," vol. II, bk. IX, ch. 1; Story, "Commentaries," vol. I, sec. 579; Sidgwick, "Elements of Politics," pp. 383 *et seq.;* Montesquieu, "Esprit des Lois," bk. XI, ch. 6.

[2] "Commentaries," vol. I, p. 412; cf. also Bluntschli, "Politik," p. 422.

convicted of grave crimes, including corrupt practices at elections; most of them exclude those who have to be supported by the state; some withhold the right from bankrupts; others deny the privilege to vagrants and even to worthy persons who do not have a fixed residence within the electoral district; some exclude the holders of certain offices, particularly those whose duties are connected with the management of election; others, like France, Germany, and Italy (and England indirectly), exclude soldiers in actual military service; some debar persons who do not own property or pay direct taxes to the state; a few exclude illiterate persons on the ground that such persons are presumed not to possess the requisite intelligence for the wise exercise of the privilege, etc. The truth seems to be, says Judge Story, that the right of voting, like many other rights, is one which, whether it has a fixed foundation in natural law or not, has always been treated in the practice of nations as a strictly civil right derived from and regulated by each society according to its own circumstances.[1]

Excluded Classes

The extent to which the privilege may be wisely allowed depends upon the general intelligence of the population, the character of the offices to be filled at the election, the political training of the people, and a variety of other circumstances. The best democratic thought of modern times favors as wide an extension of the elective franchise as is consistent with good government, and certainly the trend of recent development has been in the direction of universal manhood suffrage. Educational and property restrictions have almost entirely disappeared both in Europe and in America. Here and there, however, they still prevail in moderate form, and many able writers defend them not only as consistent with popular government but as legitimate safeguards against inefficient and corrupt government. Among such writers we may mention

Restriction demanded for Wise Exercise of Franchise

[1] "Commentaries," vol. I, sec. 580.

the names of John Stuart Mill, W. E. H. Lecky, Sir Henry Maine, Professor Sidgwick, Émile Laveleye, and Johann Kaspar Bluntschli.

Views of John Stuart Mill

Mill says, "I regard it as wholly inadmissible that any person should participate in the suffrage without being able to read and write, and, I will add, perform the common operations of arithmetic. . . . No one but those in whom *a priori* theory has silenced common sense will maintain that power over others, and over the whole community, should be imparted to people who have not acquired the commonest and most essential requisites for taking care of themselves. . . . It would be eminently desirable, that other things besides reading, writing, and arithmetic should be made necessary to the suffrage; that some knowledge of the conformation of the earth, its natural and political divisions, the elements of general history and of the history and institutions of their own country, could be required of all electors." [1] Mill, however, properly maintains that where the suffrage is made to depend upon ability to read and write, the state should provide as a matter of justice the means of attaining these accomplishments without cost to the poor, otherwise the requirement becomes a hardship. Mill also defends taxpaying qualifications as legitimate even in a democratic state. "It is important," he asserts, "that the assembly which votes the taxes, either general or local, should be elected exclusively by those who pay something towards the taxes imposed. Those who pay no taxes, disposing by their votes of other people's money, have every motive to be lavish and none to economize. . . . The voting of taxes by those who do not themselves contribute is a violation of the fundamental principle of free government; representation should be coextensive with taxation."

Opinions of W. E. H. Lecky

Lecky in his "Democracy and Liberty" dwells upon the dangers of government by the ignorant masses and, like Mill, advocates a system of suffrage which will give

[1] "Representative Government," pp. 160–161.

some consideration to education and property. The legislature, he points out, is essentially a machine for taxing, and it should be chosen by an electorate restricted mainly to those who contribute the taxes.[1] "One of the great questions of politics in our day," he says, "is coming to be, whether, at the last resort, the world should be governed by its ignorance or by its intelligence." The idea that the "ultimate source of power should belong to the poorest, the most ignorant, the most incapable, who are necessarily the most numerous, is a theory which assuredly reverses all the past experiences of mankind." [2] The election returns, Lecky goes on to say, very rarely represent real public opinion because under a system of universal suffrage there are multitudes who never contribute anything to public opinion, but cast their votes as directed by other individuals or organizations, or at haphazard, when they are ignorant of the candidates and issues. One man "will vote blue or yellow" because his father voted that way, without reference to the principles involved; others are governed by prejudices, and so on. "A bad harvest or some other disaster over which the government can have no more influence than over the march of the planets," he observes, "will produce a discontent that will often govern dubious votes and may perhaps turn the scale in a nearly balanced election." [3] Lecky predicts

[1] Lecky defends the restricted suffrage which prevailed in England before 1867. It is doubtful, he says, whether the world ever saw a better constitution than that of England from 1832 to 1867. "Few parliamentary governments," he declares, "have ever had more talent or represented more faithfully the various interests and opinions of a great nation or maintained under many trying circumstances a higher level of political purity and patriotism." "Democracy and Liberty," vol. I, p. 18.

[2] "Democracy and Liberty," vol. I, p. 21.

[3] *Ibid.* For a summary of the strange workings of universal suffrage in France between 1848 and 1871, see Lecky, pp. 29–34. The history of universal suffrage in France, says Lecky, "furnishes an impressive illustration of the truth that universal suffrage wholly fails to represent the best qualities of the nation." Few governments, he continues, have been more lavishly and criminally extravagant than those which have emanated from universal suffrage in France (p. 46).

that the day will come when it will appear to be "one of the strangest facts in the history of human folly" that the theory that the best way to improve the world and secure national progress by placing the government under the control of the least enlightened classes should have once been regarded as liberal and progressive.

Sir Henry Maine's Criticism

In considering the attitude of the ignorant masses toward scientific progress, Sir Henry Maine, one of the most powerful critics of popular government, affirms somewhat extravagantly that "universal suffrage, which to-day excludes free trade from the United States, would certainly have prohibited the spinning jenny and the power loom. It would certainly have prohibited the threshing machine. It would have prevented the adoption of the Gregorian calendar, and it would have restored the Stuarts. It would have proscribed the Roman Catholics with the mob which burned Lord Mansfield's house and library in 1780, and it would have proscribed the Dissenters with the mob which burned Dr. Priestley's house and library in 1791."[1]

Opinion of Émile Laveleye

The Belgian publicist Émile Laveleye, another critic of universal suffrage, while admitting its advantages in dignifying the individual and affording a means for the political education of the masses, yet asserts that under a parliamentary system of government it would lead to the "loss of liberty, of order, and of civilization." He compares the government of a modern state to a delicate machine prodigiously complex and extremely difficult to operate. "How can such a machine," he asks, "be operated by the ignorant and uninterested?" "If I have to choose between two absurdities," he says, "I prefer the infallibility of the pope to that of the people. The partisans of the new Catholic dogma do not invoke reason; they believe in the supernatural. But the partisans of the sovereignty of the masses do not invoke mystery; they affirm a visible, palpable nonsense, namely, that the people,

[1] "Popular Government," p. 36.

half of whom can neither read nor write, are capable of rendering an intelligent judgment upon grave questions of legislation." [1]

The Future

But notwithstanding the unfavorable opinion of such writers as those quoted above, the movement in the direction of a complete enfranchisement of the masses continues without abatement, and hardly anywhere has it made greater progress in recent years than on the continent of Europe. Nothing has occurred in Europe or America since the beginning of this movement to warrant the belief that the extravagant prophecies of Lecky and Maine regarding the future of democratic government under an extended suffrage are ever likely to come to pass. In consequence of the extraordinary interest now being manifested in public education throughout the world and the rapid multiplication by governments, monarchical and republican alike, of the facilities for educating the masses, there is every reason for believing that the democracy of the future will not necessarily be government by those whom Lecky characterized as the "most ignorant and the most incapable." Nevertheless, their warnings concerning the dangers of an extended suffrage are not to be taken lightly. The truth of much of what they have said regarding the incapacity of the ignorant masses for self-government is abundantly established by reason and the experience of the past. If government by the whole people is to be a success, they must be fitted and made capable for self-government. To vest the power of choosing those who are to rule the state in the hands of the incapable and unworthy classes, as Bluntschli justly remarks, would mean state suicide.[2] Give the suffrage to the ignorant, says Laveleye, and they will fall into anarchy to-day and into despotism to-morrow.[3] Whatever the truth in either proposition we

Conditions of Success of an Extended Suffrage

[1] "Le Gouvernement dans la Démocratie," vol. II, pp. 51–52.

[2] "Politik," p. 422.

[3] "Le Gouvernement dans la Démocratie," vol. I, p. 326.

should do well to heed the saying of John Stuart Mill that universal teaching must precede universal enfranchisement.

III WOMAN SUFFRAGE

Beginnings of the Movement for the Enfranchisement of Women

Hand in hand with the spread of democracy and the extension of the suffrage to the masses of the male population has gone the movement for the political enfranchisement of women. At the time of the French Revolution, when the dogma of universal suffrage was at its height of popularity, a petition was presented to the National Assembly asking for an extension of the right of voting to women, and it received the support of men like Condorcet and others. It was said that if voting was a natural right of the citizen, it ought not to be denied to women. In more recent times it has been advocated by Jeremy Bentham, Thomas Hare, Professor Sidgwick, and J. S. Mill in England, by Laboulaye in France, and by many men of note in America. For a long time, however, after the democratic movement had resulted in the political enfranchisement of the masses of the male population, women were wholly excluded from the suffrage in all countries, even the most democratic. Restriction of the right to vote exclusively to males was not regarded as at all inconsistent with the principle of democratic government, or with the doctrine of the consent of the governed. Soon after the middle of the nineteenth century, however, the prevailing ideas in regard to the expediency of granting the franchise to females underwent a marked change, and slowly one American state after another began to experiment with it on a small scale. At first adopted only for certain local elections, the principle was gradually extended, until recently its spread has advanced by leaps and bounds; and the signs now indicate that in the near future women will be given the full right of suffrage equally with men, in all elections without exception.

Female Suffrage in England and English Colonies

In England at the present time women possess the franchise equally with men for practically all except parliamentary elections, and are eligible to various local offices such as that of mayor, alderman, and member of municipal and county councils. Both the Conservative and Liberal parties have at different times adopted resolutions in favor of extending the franchise to women for all elections, and the Labor party, now quite strong in England, has made the question a leading part of its program. Recently the women have conducted a vigorous agitation in favor of the parliamentary franchise for themselves and have made a number of imposing demonstrations in the vicinity of the houses of Parliament. The signs seem to indicate that ultimately their demands will be granted, for certainly the movement in that country is making great headway at the present time.[1] In the Commonwealth of Australia women possess the federal franchise as well as the right of membership in the commonwealth parliament equally with men; and in the states of South Australia, New South Wales, West Australia, Victoria, and Queensland they possess full state suffrage. Likewise, in Tasmania and New Zealand they are on a footing of equality with men so far as the right of voting is concerned. In Norway and Finland the franchise has been granted to women for all parliamentary and municipal elections on the same terms as to males; and in Finland they are eligible to all offices in the state, and, in fact, are frequently chosen to the Parliament.[2] In all the provinces of Canada widows and spinsters have either the municipal or school franchise, or both; and in the northwest provinces all women, married and unmarried alike, possess both franchises equally with men.

Female Suffrage in the United States

In the United States, Colorado, Idaho, Utah, and Wyoming allow full suffrage to women under the same conditions as to men; in Delaware, Connecticut, Illinois, Kansas, Louisi-

[1] Cf. Lowell, "Government of England," vol. I, p. 217.

[2] In 1907 nineteen women occupied seats in the Parliament of Finland.

ana, Michigan, Minnesota, Massachusetts, Montana, North and South Dakota, New York, New Hampshire, Ohio, Oregon, Oklahoma, Wisconsin, and Vermont they possess the franchise in school elections; in Arizona, Kansas, Montana, New Jersey, and North and South Dakota they are allowed to vote in municipal elections; in Iowa, Louisiana, Kansas, Montana, and New York they may, if taxpayers, vote on proposed bond issues. In the United States and in many parts of Europe organized movements are being conducted for the further extension of the suffrage to women, and a number of associations are actively agitating the question through the press and from the platform. Several organizations, international in scope, have also been formed for the purpose of aiding the propaganda. In Denmark, the Netherlands, and Sweden, further extensions are likely to be made at an early date. It is worth mentioning also that few or no states that have once granted the suffrage to women have withdrawn it.

Arguments in Favor of Woman Suffrage

The principal arguments advanced in favor of the political enfranchisement of women are the following: First, differences of sex, it is maintained, do not constitute a logical or rational ground for granting or withholding the suffrage to a citizen who is otherwise qualified; in short, the criterion for determining the right is not physical, but moral and intellectual. Thus says Sidgwick: "I see no adequate reason for refusing the franchise to any self-supporting adult, otherwise eligible, on the score of sex alone; and there is a danger of material injustice resulting from such refusal so long as the state leaves unmarried women and widows to struggle for a livelihood in the general industrial competition without any special privileges or protection."[1] In short, one capable citizen is as much entitled to participate in the choosing of those who govern as another, and sex should have nothing to do in determining

Sex not a Proper Test for determining the Privilege

[1] "Elements of Politics," p. 384. Cf. also Duguit, "Droit constitutionnel," p. 93.

the rights.[1] "I consider it entirely irrelevant to political rights," says John Stuart Mill, "as difference in the color of the hair. . . . If there be any difference, women require it more than men, since, being physically weaker, they are more dependent on law and society for protection."[2]

The Privilege a Necessity for Self-protection

In the second place, it is urged that women should be given the franchise as a means of self-protection — not necessarily that they may govern, but that they may defend themselves against the unjust class legislation to which it is alleged they are frequently subjected. Laws concerning the rights of women, remarks Laveleye, ought not to be made by men alone.[3] In short, considerations of justice require that government of both men and women should not be government by men alone. The force of this argument possesses added weight on account of the character of modern industrial and social conditions under which women live. They are to-day competing with men side by side in nearly every trade and occupation and in many of the learned professions.[4] Therefore, the plea that the wage-earner should be given the ballot as a defense against his employer applies with equal, if not stronger, force to the argument for woman suffrage.[5]

[1] "If," observes Judge Story, "it be said that all men have a natural, equal, and inalienable right to vote because they are all born free and equal; that they all have common rights and interests entitled to protection and therefore an equal right to decide, either personally or by their chosen representatives, upon the laws and regulations which shall control, measure, and sustain those rights and interests — what is there in those considerations which is not equally applicable to females, as free, intelligent, moral, responsible beings entitled to equal rights and interests and protection and having a vital stake in all the regulations and laws of society?" "Commentaries," vol. I, sec. 579.

[2] "Representative Government," p. 175.

[3] "Le Gouvernement dans la Démocratie," vol. II, p. 61.

[4] In 1836 only seven vocations in the United States were open to women, namely, teaching, and the occupations of governess, seamstress, dressmaker, factory employee, and domestic servant. In 1900, according to the census reports, 4,833,630 women were engaged in gainful occupations.

[5] "There is," says Mill, "something more than ordinarily irrational in the fact that when a woman can give all the guarantees required from a male elector, inde-

Political Enfranchisement should follow Civil Enfranchisement

In the third place, it is urged that the political enfranchisement of women ought to follow naturally and logically their civil enfranchisement. Nearly everywhere the old civil and legal disabilities of women have disappeared; they are now capable of owning property, entering into contracts, and engaging in all gainful occupations equally with men. The old arguments upon which they were formerly denied equal civil rights with men are largely the same as those which are now relied upon to justify the denial to them of political rights and privileges. If they are capable of managing their own business affairs, of entering into contractual relations, of competing with men in the professions and occupations, of teaching them in the schools and colleges, they are capable of sharing with men the exercise of political privileges and rights. It is difficult indeed to defend a theory which permits the shiftless, improvident, and non-taxpaying male to have a voice in legislation, particularly when its purpose is to impose burdens upon the taxpayers, but denies a vote to the self-supporting unmarried woman who owns property and contributes to the financial support of the state. The disability, it is further contended, is inconsistent with the right of women in many countries to occupy thrones and reign over millions of subjects. In this connection we are reminded that women have made able rulers wherever they have occupied thrones. Elizabeth and Victoria in England, Maria Theresa in Austria, and Catherine in Russia are among the notable examples cited. Indeed, says Mill, in an argument for the enfranchisement of women, "the most glorious ruler that Great Britain ever had was a female."[1]

pendent circumstances, the position of a householder and head of a family, payment of taxes, or whatever may be the conditions imposed, the very principle and system of a representation based on property is set aside, and an exceptionally personal disqualification is created for the mere purpose of excluding her." "Representative Government," p. 179.

[1] "Representative Government," p. 179.

Woman Suffrage would introduce into Public Life a Purifying Element

In the fourth place, it is argued that the admission of women to a share in the management of political affairs would inure to the common good by introducing into public life a purifying, ennobling, and refining influence that would not only tend to elevate the tone of public life and bring about more wholesome political conditions in society, but would insure better government. In other words, society would gain by the change. It is generally admitted that women are morally the superiors of men, and that their influence would make for decency, righteousness, and purity in politics. Many instances are cited by the advocates of suffrage for women to show that in countries where they have been given the franchise they have wielded a decisive influence in securing the enactment of advanced social legislation, particularly as regards such matters as child labor, the employment of women in factories, the public health, tenement houses, the sale of liquor, public libraries, better educational facilities, pure food legislation, and similar matters. Nobody, observes Mill, pretends to think that women would make a bad use of the suffrage. "The worst that can be said," he continues, "is that they would vote as mere dependents at the bidding of their male relations. If it be so, let it be. If they think for themselves, great good will be done, and if they do not, no harm. It is a benefit to human beings to take off their fetters, even if they do not desire to walk. It would already be a great improvement in the moral position of women to be no longer declared by law incapable of an opinion, and not entitled to a preference, respecting the most important concerns of humanity. There would be some benefit to them individually in having something to bestow which their male relatives cannot exact, and are yet desirous to have. It would also be no small thing that the husband would necessarily discuss the matter with his wife, and that the vote would not be his exclusive affair, but a joint concern."

Arguments against Female Suffrage

Among the principal reasons advanced against the political enfranchisement of woman is that active participation in public life would tend to destroy her feminine qualities. Those who hold this view maintain that the function of maternity is woman's peculiar mission, and that the home rather than the political arena is her natural sphere. Her nature unfits her for engaging in political affairs; if she allows herself to be drawn away from the home by the distractions of the political campaign, the household of which she is the guardian, and the young which it is her high mission to bear and rear, will be neglected. In short, the exactions of political life are inconsistent with the duties of child-bearing and the rearing of families. Woman suffrage strikes at the integrity of the home and leads to the lowering of family life, says Bluntschli, for upon the wife more than upon the husband depends the welfare of the family. It is impossible, he says for man to revere and honor a "political woman." Only man, he quotes Aristotle as saying, was intended for political life. Moreover, since the family cannot be expected always to vote as a unit, female suffrage would tend to introduce discord and dissension in the home by setting each member against the other. On the other hand, if the wife voted according to the advice or dictation of the husband, her vote would be merely a duplication of the husband's, and nothing would be gained by giving her the ballot. In this case, says Bluntschli, it would be wiser to give the husband two votes, leaving to the wife the right of exerting her powerful influence but without the duty and responsibility of participating in the election herself. Both Bluntschli and Laveleye maintain that the enfranchisement of women in Catholic lands would open the way to the rule of the Jesuit class, since their votes would be effectually controlled by the priests of the Catholic church. The *Kulturkampf* struggle between state and church in Germany, observes Bluntschli, abundantly showed

It would tend to destroy Feminine Qualities

It would tend to introduce Discord into the Home

that the opinions of the female population were easily controlled by Catholic priests and that had women possessed the suffrage equally with men the struggle would have terminated in favor of the church.[1]

Military Service a Condition of Political Privilege

It is said by some opponents of female suffrage that since women are physically incapable of discharging all the duties and obligations of citizenship which devolve upon males, they have no right to demand the privileges. They cannot serve in the army or the militia or the posse comitatus, or perform jury service, or serve the state in many other capacities without violating the proprieties and safeguards of female virtue. Nevertheless, as Sidgwick has aptly remarked, the military argument has no force in states where military service is mainly voluntary and where men who are not trained soldiers are rarely called into the service.[2]

The Majority of Women do not desire the Suffrage

Finally, the argument is advanced that the majority of the female population in most states do not desire the right of suffrage, and that where it has been extended to women, they have not taken advantage of the privilege in sufficient numbers to justify the experiment.[3] But in

[1] Bluntschli, "Politik," bk. X, ch. 2; Laveleye, "Le Gouvernement dans la Démocratie," vol. II, pp. 62 ff. Esmein, likewise a strong opponent of suffrage for women, says there has been a natural division of labor and of functions between the sexes from the beginning of time, and that to man belong the duties of public life and to woman the guardianship and care of domestic life. Education and hereditary influences have, he declares, developed and fixed with each the corresponding aptitudes. "True progress," says Esmein, "consists not in drawing women into public life or into the professions hitherto reserved to men, but in rendering marriage more easy and safe and in delivering them from the servitude of manual labor." "Droit constitutionnel," p. 214. A powerful argument against woman suffrage has recently been made by Professor A. V. Dicey in a little book entitled "Letters to a Friend on Votes for Women." Professor Dicey, like Mill, was once an ardent advocate of female suffrage, but in recent years his opinions have undergone a change.

[2] "Elements of Politics," p. 385.

[3] Thus in Oregon, in 1905, where a referendum was taken on a proposition to give the franchise to women, one third of the women failed to show sufficient interest in the matter to vote at all. Likewise in Massachusetts, where in 1895 a similar proposition

reply to this it may be said that if it be true that the privilege is not desired by the majority of women, which is very doubtful, that is no reason why it should be denied to the minority who do desire it and who would take advantage of it if it were given them. On the whole, it seems to us that the weight of the argument is in favor of the enfranchisement of women — certainly of those who are unmarried and who consequently have no one to act for them at the ballot box — and, as has been shown above, the tendency of recent practice would seem to justify the prophecy of Mill that "before the lapse of another generation the accident of sex, no more than the accident of skin, will be deemed a sufficient justification for depriving its possessor of the equal protection and just privileges of a citizen." [1]

was submitted to the people, men and women alike, only about 22,000 out of a total of 575,000 women voted on the proposition. There were 57 towns in which not a single woman voted.

[1] "Representative Government," p. 179.

CHAPTER XVI

THE EXECUTIVE DEPARTMENT

Suggested Readings: AUCOC, "Droit administratif," vol. I, Introduction; BAGEHOT, "The English Constitution," ch. 3; BERTHÉLEMY, "Rôle du Pouvoir executif dans les Républiques modernes," pp. 1–48; also his "Traité élémentaire de Droit administratif," bk. I, ch. 1; BOSC, "Les Pouvoirs legislatifs des Presidents des États Unis"; BRADFORD, "Lessons of Popular Government," vol. II, chs. 30–32; BRYCE, "American Commonwealth," chs. 4–8; BURGESS, "Political Science and Constitutional Law," vol. II, bk. III, ch. 9; COOLEY, "Principles of Constitutional Law," ch. 5; DOUGHERTY, "The American Electoral System," Introduction and ch. 1; DUCROCQ, "Cours de Droit administratif," vol. I, Introduction; DUGUIT, "Droit constitutionnel," secs. 38–40, 136–146; see also his "L'État, les Gouvernants et les Agents," ch. 3; ESMEIN, "Droit constitutionnel," pt. II, chs. 2–4; FAIRLIE, "National Administration of the United States," chs. 1–2; FINLEY and SANDERSON, "The American Executive and Executive Methods," chs. 3–5; "The Federalist," Nos. 67–75; GOODNOW, "Principles of Administrative Law," bk. II; KENT, "Commentaries on American Law," vol. I, lect. XIII; PRADIER-FODÉRÉ, "Précis de Droit administratif," pt. I, ch. 1; SIDGWICK, "Elements of Politics," chs. 21–22; STORY, "Commentaries," secs. 1410–1489; WALTHER, "Das Staatshaupt in den Republiken"; WOOLSEY, "olitical Science," vol. II, ch. 9.

I. PRINCIPLE OF ORGANIZATION; PLURAL VERSUS SINGLE EXECUTIVES

Meaning of the Term Executive

IN a broad sense we mean by the executive the aggregate or totality of all those governmental agencies which are concerned with the execution of the will of the state. In this sense the term embraces not only the chief magistrate, but also his principal advisers and ministers, as well as the whole body of subordinate officials through whom the laws are administered. As thus understood, the executive embraces the whole governmental organization, with the

exception of the legislative and judicial organs. In this wider signification cabinet heads, chiefs of bureaus, diplomatic agents, tax collectors, inspectors, commissioners, postmasters and policemen, and even army and navy officers, are a part of the executive and collectively constitute the executive department. In a still wider sense it includes even the judges of the courts, since they are concerned with the interpretation and application of the law, —functions which in reality have to do with the general act of execution. In the narrowest sense the term is applied to that supreme authority, whether an individual or body, which is intrusted with the appointment, supervision, and control of the various subordinate agencies through which the state will is carried out.

Distinction between the Actual and the Titular Executive

In considering the nature of the executive we must further distinguish between the real or actual executive on the one hand, and the nominal or titular executive in whose name the government is administered, but who in fact has little to do with the actual work of administration. Thus in countries like Great Britain, having the fully developed cabinet system of government, the real executive is the ministry, the crown being the executive only in a nominal sense.

Principles of Organization

On account of its peculiar nature the executive power must be organized upon principles fundamentally different from those upon which the legislative power is organized. Necessarily, the legislative authority must be a more or less numerous body, that is, it must be an assembly composed of representatives elected at frequent intervals from the body of the people. Its peculiar function is to deliberate, consult upon the general needs of society and lay down rules of conduct for the guidance of private individuals and public officials.[1] For the wise discharge of such functions a body of persons is manifestly better fitted than a single individual, for it is an old and true maxim

[1] Compare Sidgwick, "Elements of Politics," p. 413.

that "in a multitude of councilors there is wisdom." The function of the executive, however, is not primarily to deliberate, nor to formulate and express the will of the state, but to execute, enforce, and carry out the state will as expressed by the legislature. The prime requisites for efficiency in the discharge of such functions are, therefore, promptness of decision, singleness of purpose, energy of action, and sometimes secrecy of procedure. It may be stated in general terms, says Judge Story, that that organization is best which will at once secure energy in the executive and safety to the people.[1] Obviously, therefore, a single person or a very small body of persons is better fitted for the discharge of such duties than a numerous assembly composed of many minds and entertaining a variety of views. "The advantages of a single chief," says Woolsey, "are obvious; he is able to bring unity and efficiency into the government, and being alone, he or his ministry is responsible; whereas two presidents would be apt to checkmate one another, if they were of different parties, and would be jealous and rivals if they were of the same party."[2] To organize the executive power by dividing it among a number of coördinate and equal authorities would necessarily lead to its enfeeblement, if not its utter dissipation, especially in times of crises when promptness of decision and energy of action may be essential to the preservation of the life of the state.[3] In military administration the plural form of executive is wholly out of place and full of peril. The saying attributed to Napoleon, that "one bad general is better than two good ones," represents an exaggerated, though not wholly erroneous, estimate of the weakness of a dual executive in military matters. An executive organized on the collegial principle is incompatible with

Unity of Organization Essential

[1] "Commentaries," vol. II, sec. 1417.

[2] "Political Science," vol. II, p. 270; cf. also Kent, "Commentaries," vol. I, lect. XIII, sec. I.

[3] Compare Sidgwick, "Elements of Politics," p. 410.

force, energy, unity of purpose, and independence. Unity in organization is essential to strength, while division is a source of weakness. The executive, first of all, must possess strength and power, because it is charged with the great task of enforcing the will of the state.

Examples of Executives organized on the Collegial Principle

History furnishes some examples of the plural form of executive, but they were all short-lived. In ancient Athens the executive power was split up into fragments and divided between generals, archons, etc., each being independent of the other. The Roman constitution for a long time provided for two consuls, each of whom was invested, not with a part of the executive power, but the whole of it, and each could in effect veto the action of his colleagues. Sparta, in early times, had two kings, and the principle of "plurality" was extended to the organization of subordinate offices such as prætors and consuls.[1] France after the Revolution experimented with the plural form of executive under several different constitutions. That of 1795 vested the executive power in a Directory of five persons, but the results were anything but satisfactory.[2] Nevertheless, the principle of plurality was retained in the constitution of 1799,[3] which, in theory, vested the supreme executive power in three consuls appointed for ten years, but in reality the second and third consuls were little more than

[1] Woolsey, "Political Science," vol. II, p. 269. "The experience of other nations," said Hamilton in "The Federalist" (No. 69), "will afford little instruction on this head. As far, however, as it teaches anything it teaches us not to be enamored of plurality in the executive. We have seen that the Achæans on an experiment of two prætors were induced to abolish one. The Roman history records many instances of mischief to the republic from the dissensions between the consuls and between the military tribunes who were at times substituted for the consuls."

[2] Esmein, "Droit constitutionnel," third ed., p. 473. The Directory, observes St. Girons, "was a sad government; it vacillated between feebleness and violence. The enfeeblement of the executive power led to the establishment of a turbulent and irresponsible assembly." Such an organization of the executive, he adds, is "the best school to inspire the people with love for a dictatorship." "La Séparation des Pouvoirs," p. 263.

[3] Constitution, title IV, art. 9.

figureheads. The institution was continued under the senatus consultum of 1802.[1]

The Swiss Executive the only Modern Example of a Plural Executive

At the present time, the executive in every state, with one exception, is organized on the single-headed principle. The exception is found in the constitution of the Swiss republic, which vests the executive power in a council of seven persons. One of the seven bears the title and dignity of President of the Confederation and performs the ceremonial duties of the executive office, but, in reality, he is merely chairman of the council and shares the executive power equally with his colleagues. He is in no sense the supreme head of the administration and carries no greater responsibility than his fellow councilors. The practical working of the institution in Switzerland has been attended with less difficulty than the plural form elsewhere, mainly on account of certain habits and traditions of the Swiss people, and because the ground had already been prepared through local experience. For a long time the collegial form of executive had existed in the separate cantons, and hence when it was introduced into the constitution of the confederation, in 1848, the institution had passed the experimental stage.[2]

Views of Hamilton

The testimony of political writers and statesmen has been practically unanimous in favor of the principle of unity in the construction of the executive office. No one has more powerfully defended it than Alexander Hamilton." "Energy in the executive," he said, "is a leading characteristic in the definition of good government. It is essential to the protection of the community against foreign attacks. It is not less essential to the steady administration of the laws;

[1] Esmein says that some Frenchmen desired to establish the collegial form of executive in 1871, contending that it offered the best guarantees against arbitrary power, since it would prove a more efficient check on the acts of a single ambitious and unscrupulous executive. "Droit constitutionnel," p. 472.

[2] Rüttimann, "Das Nordamerikanische Bundestaatsrecht verglichen mit den politischen Einrichtungen der Schweiz," vol. I, sec. 201; Esmein, *op. cit.*, p. 475; Lowell, "Government and Parties in Europe," vol. II, pp. 196–208.

to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least familiar with Roman history knows how often Rome was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator, as well as against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasion of external enemies who menaced the conquest and destruction of Rome." [1] A feeble executive, he justly observed, implies a feeble government and is but another name for bad government.

Views of Judge Story

"The most distinguished statesmen," says Judge Story, "have uniformly maintained the doctrine that there ought to be a single executive and a numerous legislature. They have considered energy as the most necessary qualification of the executive power, and this is best attained by reposing it in a single hand.[2] Plurality in the organization of the executive also tends to conceal faults and destroy responsibility.[3] Responsibility under such an arrangement, observes Mill, is a mere name. What the "board" does, he goes on to say, is the act of nobody, and nobody can be made to answer for it. Where a number are responsible, the responsibility is easily shifted from one shoulder to another, and hence both the incentive in the executive

[1] "The Federalist," No. 69.

[2] "Commentaries," secs. 1419, 1424. Cf. also Montesquieu, "Esprit des Lois," bk. XI, ch. 6. Also John Stuart Mill, "Representative Government," ch. 14. "Where the object to be attained," says Mill, "is single, the authority commissioned to attend to it should be single. The entire aggregate of means provided for one end should be under the same control and responsibility. If they are divided among independent authorities, the means, with each of those authorities, become ends, and it is the business of nobody except the head of the government . . . to take care of the real end."

[3] De Lolme, "Constitution of England," bk. II, ch. 2.

and the advantage of the restraint of public opinion are lost.

Delegation and Distribution of Executive Power

For convenience of administration a large part of the executive power in a complex, modern state, however, must necessarily be delegated and distributed among subordinate authorities. No single person is physically capable of exercising the whole of that power. But that does not necessarily involve a division of the power in the final analysis; the supreme responsibility is still in the hands of a single magistrate and hence is a unit.

Executive Councils

Sometimes, however, the unity of the executive power is in effect destroyed or impaired by vesting it ostensibly in one person, but really dividing it between him and a council to whose advice and control he is made subject. Thus in the early constitutions of the American states the executive in nearly every instance was subjected to the control, in a large degree, of such a council; and indeed in two states, namely, Pennsylvania and Vermont, the executive power was virtually vested in a board.[1]

In the United States

A strong effort was made in the convention which framed the constitution of the United States to associate an execu-

[1] See W. C. Morey, "Revolutionary State Constitutions," in the "Annals of the American Academy of Political and Social Science," vol. IV, p. 27; and W. C. Webster, "State Constitutions of the Revolution," in the same periodical, vol. IX, p. 80. "The idea of a council to the executive," says Hamilton, in "The Federalist," No. 70, "which has so generally obtained in state constitutions has been derived from that maxim of republican jealousy which considers power as safer in the hands of a number of men than of a single man. If the maxim should be admitted to be applicable to the case, I should contend that the advantage on that side would not counterbalance the numerous disadvantages on the opposite side. But I clearly concur in opinion, in this particular, with a writer whom the celebrated Junius pronounces to be 'deep, solid, and ingenious,' that 'the executive power is more easily confined when it is one'; that it is far more safe should there be a single object for the jealousy and watchfulness of the people. . . . The Decemvirs of Rome, whose name denotes their number, were more to be dreaded in their usurpation than any one of them would have been. . . . A council to a magistrate who is himself responsible for what he does are generally nothing better than a clog upon his good intentions; are often the instruments and the accomplices of his bad, and are almost always a cloak to his faults."

tive council with the President, but the project was finally defeated by a vote of eight states to three. In the German Empire the Federal Council (*Bundesrath*) shares with the chief executive an important part of the executive power, so much so, indeed, that some of the German writers treat the Federal Council as the real executive and the emperor as merely its agent.[1] It participates in the appointment of certain imperial officers, sanctions important ordinances issued by the emperor, frames the arrangements necessary for the administration of the laws when no provision has been made by imperial law, exercises a sort of supervision over the execution of the laws; and its consent is necessary to declarations of war and to the ratification of treaties.

In Germany

In England

In France

In England, likewise, various acts of the executive, particularly those known as orders in council, require for their validity the approval of the Privy Council.[2] The President of the French Republic is required to consult the Council of State in many cases, especially in regard to issuing ordinances; but the French idea is so averse to the diffusion of responsibility that the executive is not compelled to act upon the advice which the council may give him. There is a saying of the French that "to act is the function of one; to deliberate, that of several;" and while the value of advice is fully recognized, they are unwilling to sacrifice the advantages of responsibility in order to establish a control over the executive.[3]

"The President of the United States," says De Tocqueville, "was made the sole representative of the executive powers of the Union, and care was taken not to render his decisions subordinate to the vote of a council — a dangerous measure which tends at the same time to clog the action of the government and to diminish its responsibility. The

[1] Cf. Zorn, "Staatsrecht," vol. I, p. 156; also Goodnow, "Comparative Administrative Law," vol. I, p. 116.

[2] Todd, "Parliamentary Government," vol. II, p. 80.

[3] Compare Goodnow, "Comparative Administrative Law," vol. I, pp. 86, 112.

Senate has the right of annulling certain acts of the President; but it cannot compel him to take any steps, nor does it participate in the exercise of the executive power. . . . The Americans have not been able to counteract the tendency which legislative assemblies have to get possession of the government, but they have rendered this propensity less irresistible." [1]

Value of an Advisory Council

No possible objection, it would seem, can be urged against the scheme of associating a merely advisory council with the executive. Such an arrangement ought to bring strength and wisdom to the executive department. Mill has justly observed that a man seldom judges right when he makes habitual use of no knowledge but his own or that of a single adviser. The work of administration is often complex and difficult and requires for its efficient performance highly technical and special knowledge, not only on the part of those who actually perform the service, but often on the part of the chief magistrate who directs the administration. Such knowledge he rarely possesses, hence the advantage of an advisory council composed in part of men who do possess it is clearly evident. But the ultimate decision in most cases ought to be with the executive, and the responsibility ought to rest upon him. It is easy, as Mill has remarked, to give the effective power and the full responsibility to one, providing him when necessary with advisers, each of whom is responsible only for the opinion he gives.[2]

The principal argument which has been advanced in support of the plural form of executive is that it furnishes greater guarantees against the dangers of executive abuse and oppression and renders more difficult executive encroachments upon the sphere of the legislature and upon the liberties of the people in general.[3] It is mainly for this

[1] "Democracy in America," vol. I, pp. 125, 126.
[2] "Representative Government," p. 244.
[3] Compare Esmein, "Droit constitutionnel," p. 472.

reason that the executive is often subjected to the control of a council in those branches of administration which afford the largest temptations and opportunities for abuse of power.

Argument in Favor of a Plural Executive

An executive constituted on such a principle manifestly could not plan and execute a *coup d'état*, nor invade the spheres properly belonging to the other departments, with the same ease and readiness with which a single ambitious individual could, unrestrained by a council or opposed by colleagues who share with him responsibility. It is sometimes claimed that the vesting of the supreme executive power in the hands of a single person is a relic of absolutism and hence is inconsistent with the genius of a republican government. It is difficult, says Story, to find a sufficient ground on which to rest this notion; and those which are usually stated "belong principally to that class of minds which readily indulge in the belief of the general perfection, as well as perfectibility of human nature, and deem the least possible quantity of power with which government can subsist to be the best." [1] Finally, it is contended by some that an executive organized on the plural principle, while perhaps lacking the advantages of unity and energy, yet is likely to possess a higher degree of ability and wisdom than can be found in any single person. The executive power, it is pointed out, involves much more than the mere ministerial function of executing the commands of the legislature; it often involves the formulation of constructive policies, as well as important powers of direction requiring the exercise of wide discretion and judgment, duties that can be more

[1] "Commentaries," vol. II, sec. 1417. Milton, in his "Ready and Easy Way to establish a Free Commonwealth," held this opinion. Both Locke and Hume, mainly for the same reason, advocated the vesting of the executive power in small assemblies. (Locke, "Fundamental Constitution for the Carolinas"; Hume, "Essays" vol. I, p. 526.) For criticisms of this view, see Kent, "Commentaries," 12th ed., vol. I, p. 283; and Adams, "Defense of the American Constitutions." No. 54.

wisely discharged by a body of persons than by a single individual.

But the merits are more than offset by the disadvantages; and when all is said that can be said in favor of the plural executive, the fact remains that experience has demonstrated its inherent weakness and has justified the single form.

II. MODE OF CHOICE OF THE EXECUTIVE

Methods of Choice

Four different methods of choosing the executive have been followed in practice: first, the hereditary principle; second, direct election by the people; third, indirect election by a body of intermediate electors, either themselves popularly elected or chosen by some branch of the government; and, fourth, election by the legislature.

The Hereditary Principle

In all the monarchical states of Europe to-day the executive (that is, the nominal or titular executive) is hereditary in a particular family or dynasty. Before the rise of popular government this principle of selection was practically universal and it still survives in a large part of the world to-day, but is tolerated perhaps rather than preferred, being more the result of historical conditions than of deliberate creation. It is doubtful whether the principle is destined to be extended in the future either through the reorganization of existing states or the establishment of new ones.[1] Hereditary tenure of public office no longer seems to be in keeping with the spirit of popular government, and as a practical rational system of appointment it has few merits, as we have explained in the chapter on forms of government.[2]

[1] Nevertheless, Norway in 1906 chose it in preference to an elective republic.

[2] "Looking at the subject from a purely scientific standpoint," says Burgess, "it seems to me that a democratic state may, without violence to its own principle, construct for itself a government in which the executive power will hold by hereditary right." Burgess admits, however, that it "is not the most natural tenure for the executive of a democratic state." "It implies the existence of unusual conditions and the observance of difficult requirements, such as the existence of a royal house whose foundation is far back of the revolution which changed the state from its monarchical

Merits of the Hereditary Principle

But it must be borne in mind that hereditary executives are not, as has been said, ordinarily the actual chiefs of the administration, but only the titular heads. Their office is mainly to lend dignity, majesty, and ornament to the government, somewhat as a cupola is intended to add grace and proportion to a building. The institution tends to introduce into the administration of the government elements of stability, permanence, continuity, and experience, and in the relations of the state with foreign powers it tends to add a certain prestige which is not without weight in diplomatic intercourse. The value of a hereditary executive in the government of the state has been well set forth by the English writers Bagehot and Todd.[1] Bagehot, in his defense of monarchy, declares that the masses have little respect or reverence for an executive which they assist every half-dozen years to create. A hereditary monarch, he argues, is a powerful means of attaching the masses to the government and of securing their loyalty and obedience. Among the advantages of the hereditary principle, says Burgess, that are manifest even to one surrounded by the prejudices of the New World are: first of all, a respect for government and a readiness to obey the law which can in no other way be attained until the political society shall have reached a degree of perfection far beyond anything which at present exists anywhere in the world.[2]

or aristocratic to its democratic form, and that the reigning house has accommodated itself to the spirit of the revolution, and has retained its hold on the people." "Political Science and Constitutional Law," vol. II, p. 308.

[1] Bagehot, "The English Constitution," ch. 3; Todd, "Parliamentary Government," vol. I, ch. 4.

[2] "Political Science and Constitutional Law," vol. II, p. 309. "The great advantage of hereditary monarchies," said De Tocqueville, "is that as the private interest of a family is always intimately connected with the interests of the state, the executive government is never suspended for a single instant; and if the affairs of a monarchy are not better conducted than those of a republic, at least there is always some one to conduct them, well or ill, according to his capacity. In elective states, on the contrary, the wheels of government cease to act, as it were, of their own accord at the approach of an election and even for some time previous to that event." "Democracy in America," trans. by Reeves, vol. I, p. 133.

But when all is said that can be said in favor of the hereditary principle as a mode of selecting the executive, the weight of evidence and the testimony of experience are against it. It can only be looked upon as a survival of a past age, and its ultimate disappearance will doubtless follow in the course of the political evolution of the future.

Direct Popular Election

The choice of the executive by the direct vote of the people represents the opposite principle to that of the hereditary method. It is confined mainly to republics, though there have been, as we have shown in a previous chapter, occasional examples of elective monarchies.[1] At the present time the national executives of a number of the South American republics, notably those of Bolivia, Brazil, and Peru, are chosen by direct popular vote; and this is true, of course, of the local state executives in the United States. In form, the method of electing the President of the United States is indirect, though, owing to a metamorphosis of the electoral system, the method has to a large degree come to be direct. The advantages of the method of popular election are, that it is more distinctly in accord with modern notions of popular government, stimulates interest in public affairs, affords a means of political education for the masses, and secures the choice of a chief magistrate in whose ability and integrity the people have confidence and to whom he is more or less directly responsible for his official conduct.

Its Advantages

Objections to Popular Choice

The principal objections to direct popular election are: the incompetency of the masses in a country of vast area to judge intelligently of the qualifications of a candidate for so important an office, their liability to be influenced by demagogues, and the general demoralization and the political excitement which are almost inseparable from a contest of such magnitude. "The election of a supreme magistrate for a whole nation," wrote Chancellor Kent, "affects so many interests and addresses itself so strongly to popular

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passions and holds out such powerful temptations to ambition that it necessarily becomes a strong trial to public virtue and even hazardous to the public tranquillity." "It has been found impossible," continues the same distinguished author, "to guard the elections from the mischiefs of foreign intrigue and domestic turbulence, from violence or corruption; and mankind have generally taken refuge from the evils of popular elections in hereditary executives as being the least evil of the two. The most recent and remarkable change of this kind occurred in France, in 1804, when the legislative body changed their elective into an hereditary monarchy on the avowed ground that the competition of popular elections led to corruption and violence." [1]

Opinions of Early American Publicists

Among the framers of the constitution of the United States only three or four favored direct popular election of the chief magistrate. Nearly all the delegates who expressed an opinion on the subject were full of profound distrust of such a method. Roger Sherman declared "that the people would never be sufficiently informed of the character of men to vote intellectually for the candidates that might be presented"; Charles C. Pinckney thought "the people would be incited by designing demagogues"; Gerry stigmatized the proposition as "radically vicious"; and Mason went so far as to say that "it would be as unnatural to refer the choice of a proper person for President to the people,

[1] "Commentaries," vol. I, pp. 274–275. Speaking of the mode of choosing the President of the United States which at the time he wrote had become direct in substance, Kent declared: "If ever the tranquillity of this nation is to be disturbed and its liberties endangered by a struggle for power, it will be upon this very subject of the choice of a President. This is the question that is eventually to test the goodness and try the strength of the constitution; and if we shall be able, for half a century hereafter, to continue to elect the chief magistrate of the Union with discretion, moderation, and integrity, we shall undoubtedly stamp the highest value on our national character and recommend our republican institutions, if not to the invitation, yet certainly to the esteem and admiration of the more enlightened part of mankind." Compare also an article by the author entitled, "Shall the Electoral College be Abolished?" in the "Independent" for January 27, 1910."

as to refer a trial of colors to a blind man;" Hamilton feared that it would "convulse the community with extraordinary and violent movements" and lead to "heats and ferments" that would disturb the public tranquillity.[1] Experience has shown, however, that the evils which the framers of the constitution predicted were greatly exaggerated, and, happily, their worst fears have not been realized. Nevertheless, it cannot be denied that some of these evils have not been entirely absent. The long period of business depression, the intense strain upon the public virtue, the heated political excitement and passion, and the general demoralization which have come to be regular features of our quadrennial contests over the choice of the chief magistrate in the United States have abundantly shown that the method of popular election is not in all respects ideal. One of its worst features is what Mill called "the mischief of intermitted electioneering." When the highest dignity in the state, he declared, is to be conferred by popular election once in every few years, the whole intervening time is spent in what is virtually a canvass. President, ministers, chiefs of parties, and their followers are all electioneers. The whole community is kept intent on the mere personality of politics, and every public question is discussed and decided with less reference to its merits than to its expected bearing on the presidential election. If a system had been devised, Mill goes on to say, to make party spirit the ruling principle of action in all public affairs and create an inducement not only to make every question a party question, it would have been difficult to contrive any means better adapted to the purpose.[2]

"A most important principle of good government in a popular constitution," to quote Mill further, "is that no

[1] Dougherty, "The Electoral System of the United States," pp. 13–14; also "The Federalist," No. 67.

[2] "Representative Government," p. 250. Cf. also Paley, a vigorous opponent of elective executives, "Moral and Political Philosophy," p. 215.

executive functionaries should be appointed by popular election, neither by the votes of the people themselves, nor by those of their representatives." The business of government, he points out, requires skill, special information, and technical knowledge, and only those who possess in some degree those qualifications are capable of choosing such functionaries. The task of finding and choosing them, he asserts, "is very laborious and requires a delicate as well as a highly conscientious discernment." [1]

Popular Election of Subordinate Officials

So far as the selection of subordinate executive officials is concerned, we believe this to be a sound proposition; and one of the chief weaknesses in the constitutions of the local governments in the United States to-day arises from the wide extension of the elective principle to the appointment of officials whose duties are administrative in character, and the performance of which requires qualifications which are difficult to obtain by popular election. This evil has lately come to be a source of general complaint in connection with state and municipal government where such officials as railroad and insurance commissioners, clerks of various kinds, law officers, and even engineers and other administrative experts are often chosen by popular election. But does this objection necessarily apply to the choice of the chief executive? Mill, who condemns the system of popular election for all subordinate executive functionaries, has himself raised the question as to whether the chief executive, especially in a republic, might not be made an exception. "There is," he admits, "unquestionably some advantage in a country like America where no apprehension need be entertained of a *coup d'état*, in making the chief executive constitu-

[1] "Representative Government," pp. 247–248. "Popular election," observes Sidgwick, "seems generally undesirable as a mode of appointing even the highest grade of subordinates; partly because it would tend to give the elected official too independent a position, partly because the electors would not ordinarily be good judges of the special qualifications required for the different kinds of work." "Elements of Politics," p. 414.

tionally independent of the legislative body and rendering the two great branches of the government, while equally popular both in their origin and in their responsibility, an effective check on one another."[1]

Advantages of Indirect Election

The method of indirect election is the system employed in choosing the national executives of the United States, the Argentine Republic, Chile, Mexico, and a few other Latin American republics, although the elective scheme for choosing the President of the United States has, as has been said, come to be largely direct in fact. The advantages claimed for the indirect system are that it affords a means of avoiding the "heats," "tumults," and "convulsions" of direct election, and at the same time leads to a more intelligent choice, by restricting the immediate selection to a small body of capable and well-informed representatives.

Views of Hamilton

"The choice of several to form an intermediate body of electors," said Hamilton, in defense of the scheme adopted for the election of the President of the United States, and the metamorphosis of which was not then foreseen, "will be much less apt to convulse the community with any extraordinary and violent movements than the choice of one who was himself to be the final object of the public wishes." "It was desirable," he continued, "that the immediate election should be made by men most capable of analyzing the qualities adapted to the station. A small number of persons selected by their fellow-citizens from the general mass will be most likely to possess the information and discernment requisite to so complicated an investigation." [2]

[1] "Representative Government," p. 249.

[2] "The Federalist," Ford's ed., No. 68. See also Story, "Commentaries," sec. 1457. The theory of the electoral college, said the Senate Committee on Elections in 1874, was "that a body of men should be chosen for the express purpose of electing a President and Vice President, who would be distinguished by their eminent ability, who would be independent of popular passion, who would not be influenced by tumult, passion, or intrigue, and who in the choice of the President would

Objections to Indirect Election

In theory, the method of indirect election possesses conspicuous merits; but the difficulty lies in the fact that the electors are apt to be chosen under party pledges to vote for a particular candidate, and thus become mere agents for registering the will of the voters. This is almost inevitable in states where political parties are highly developed and well organized. This is exactly what happened in the United States as soon as party lines came to be fully drawn and party discipline became effective. In the early presidential elections the best results expected of the electoral scheme were fully realized, the electors exercising their full judgment in choosing the President; but in the course of time they became mere "party puppets," with no discretion or freedom in the discharge of what were originally intended to be solemn and important functions. Their duties are now restricted to registering the choice of the party voters — a function which an automaton without intelligence or volition could as fittingly discharge.[1] Thus what was intended to be a scheme of indirect election, in which the immediate choice of the chief executive was to be made by a select body of highly capable men, has in the course of a remarkable development become in reality a system of direct election by the millions, who still go through the form of voting for electors whose real office has long since disappeared. Such was the scheme of which Hamilton did not hesitate to affirm "that if the manner of it be not perfect, it is at least excellent," and which was the only part of the constitution "that escaped without severe censure or which received the slightest mark of approbation from its opponents." [2]

Election by the Legislature

Finally, the chief executive may be chosen by the legislative branch of the government. This method is followed

be left perfectly free to exercise their judgment in the selection of the proper person." Quoted by Dougherty in his "Electoral System of the United States," p. 16.

[1] Cf. Dougherty, "Electoral System of the United States," p. 250; and Wilson, "Congressional Government," p. 250.

[2] "The Federalist," No. 68.

in Switzerland and in France (where the two chambers organized in national assembly at Versailles constitute the electoral body for choosing the president of the republic.)[1] This was a system employed in a number of the American states for a time after the Revolution, and is still the method prescribed in several of them in case no candidate receives a majority of the popular vote. It was the method first decided upon by the Philadelphia convention of 1787 for the election of the President of the United States, but was finally abandoned upon reconsideration for the scheme described above.

Objections

The main objection to choice by the legislature is that it violates the principle of the separation of governmental powers by imposing upon the legislative branch a duty alien to its primary function, and making the executive to some extent an agent or instrument of the legislature.[2] If the executive owed his office to the legislature, "bargains," "intrigues," and "cabals" between him and Congress would not be wanting. "It would be in the power of an ambitious candidate," observed Judge Story, "by holding out the rewards of office, or other sources of patronage and honor, silently but irresistibly to influence a majority of votes;

[1] The French vested the election of their president in the legislature because of their fear of an executive elected by and responsible to the people. They had had an unfortunate experience with an executive chosen by popular suffrage, and they sought to guard against the danger in the future by making the president elected by and responsible to the legislature organized in national assembly. But they created a very weak executive in doing this. Burgess, "Political Science and Constitutional Law," vol. II, p. 311.

[2] Compare Rawle, "On the Constitution," ch. 5, p. 58. Bryce thus states the reasons for the rejection by the Philadelphia convention of both the methods of popular election and appointment by the legislature: "To have left the choice of the chief magistrate to a direct popular vote over the whole country would have raised a dangerous excitement and would have given too much encouragement to candidates of merely popular gifts. To have intrusted it to Congress would have not only subjected the executive to the legislature in violation of the principle which requires these departments to be kept distinct, but have tended to make him a creature of one particular faction instead of the choice of the nation." "American Commonwealth," abridged ed., ch. 4.

and thus by his own bold and unprincipled conduct to secure choice, to the exclusion of the highest and purest and most enlightened men in the country."[1] A similar opinion was entertained by Chancellor Kent, who remarked that "all elections by the representative body are peculiarly liable to produce combinations for sinister purposes."[2] Both reason and experience teach that election by the legislature not only impairs the independence of the executive and tends to make him subservient to its will, but creates a powerful temptation to an ambitious candidate to gain the support of the legislature by promises of official reward or influence. Once elected, he is under the same temptation to secure reëlection. To be fully independent of legislative control and free of such temptations, the excutive must owe his office to a different source.

Finally, it should be observed that the imposition of so important a political duty upon the legislature is likely to interfere with its normal function of lawmaking, by introducing into its procedure a distracting element which on occasions of great and exciting contests must necessarily consume its time, lead to conflicts and deadlocks, and give a party coloring to the consideration of many measures which are in reality nonpartisan in character. If proof of this were needed, one has only to consider the effect upon the procedure of the American state legislatures in choosing United States senators, when there are close and exciting contests.[3] In most such contests, if of long duration, the legislative output is generally inferior in quality.

[1] "Commentaries," sec. 1456.

[2] "Commentaries," lect. XII, p. 279. Cf. also Woolsey ("Political Science," vol. II, p. 278), who remarks "that election by the legislature would be a source of great corruption. Men who had votes in their hands would bargain for places for themselves or their friends; a system of intrigue on a vast scale would be initiated which would have disastrous consequences — of intrigue not only between members of the legislature and agents of candidates, but of intrigue of politicians desirous of getting a place in the body which was to choose the chief magistrate."

[3] See Haynes, "Election of United States Senators," ch. 8.

Argument in Favor of Election by the Legislature

The chief argument in favor of choice by the legislature is that the selection is likely to be more wisely made than when done by the masses of voters, or by any body of intermediate electors especially chosen for the purpose. Being actively concerned with public affairs and acquainted with the leading statesmen, the members of the legislative branch are of all persons most qualified to choose a fit man for so high a station. John Stuart Mill was an advocate of this method for the election of executives of republics although he questioned whether it was the best for all times and places. "It seems better," he said, "that the chief magistrate in a republic should be appointed avowedly, as the chief minister in a constitutional monarchy is virtually, by the representative body. The party which has the majority in parliament would then as a rule appoint its own leader; who is always one of the foremost, and often the very foremost, person in political life."[1] But this is by no means always true, as experience with the convention method of nominating candidates in the United States and the election of United States senators by the state legislatures have clearly shown.

III. THE TERM OF THE EXECUTIVE

Views of Hamilton

"The ingredients which constitute energy in the executive," said Alexander Hamilton, "are: first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers;" while those "which constitute safety in the republican sense are, first a due dependence on the people; secondly, a due responsibility."[2] The element of duration was, he observed, necessary to

[1] "Representative Government," p. 249. Two other advocates of election by the legislature are Esmein, "Droit constitutionnel," pp. 483 ff.; and Laveleye, "Le Gouvernement dans la Démocratie," vol. I, pp. 347–349. Esmein denies that choice by the legislature involves a violation of the principle of the separation of powers.

[2] "The Federalist," No. 70. The numbering here is that observed in Ford's edition.

secure "personal firmness of the executive magistrate in the employment of his constitutional powers" and to insure the "stability of the system of administration which may have been adopted under his auspices."[1] Hamilton stood almost alone among the distinguished men who framed the constitution of the United States in advocating a good behavior tenure for the executive, the idea being repugnant to the views of the majority of the delegates as being inconsistent with republican ideas, and hence it received little consideration at the hands of the convention.[2] Concerning the length of term sufficient to secure the elements of firmness in the executive and stability in the administration, Hamilton declared that "the longer the duration in office the greater will be the probability of obtaining so important an advantage." "It is a general principle of human nature," he said, "that a man will be interested in whatever he possesses, in proportion to the firmness or precariousness of the tenure by which he holds it; will be less attached to what he holds by a momentary or uncertain title, than to what he enjoys by a durable or certain title; and, of course, will be willing to risk more for the sake of the one, than for the sake of the other. This remark is not less applicable to a political privilege, or honor, or trust than to any article of personal property. The inference from it is, that a man acting in the capacity of chief magistrate, under a consciousness that in a very short time he must lay down his office, will be apt to feel himself too little interested in it to hazard any material censure or perplexity, from the independent exertion of his powers, or from encountering the ill humors, however transient, which may happen to prevail either in a considerable part of the society itself, or in a predominant

[1] "The Federalist," No. 71.

[2] Madison and Jay also favored the good behavior tenure for the President. After it was decided to make the office elective Hamilton seems to have changed his opinion. See Story, "Commentaries," sec. 1435, note 2.

faction of the legislative body."[1] In this opinion Judge Story fully concurred. Few men, he declared, would be willing to commit themselves to a course of policy whose wisdom might be perfectly clear to themselves if they could not be permitted to complete what they had begun. "Of what consequence," he observed, "will it be to form the best plans of executive administration, if they are perpetually passing into new hands before they are matured, or may be defeated at the moment when their reasonableness and their value cannot be understood or realized by the public — who will plant when he can never reap?"[2]

Judge Story's Opinion

Practice of Modern States

That the term of the executive ought to be long enough to secure these advantages no one will deny, but as to what this period is, the testimony of political writers and the practice of states differ. In practice, the executive tenure ranges from one year, which is the rule in several of the North American states, to seven years, which is the term of the executive of the French Republic. In the states of Massachusetts and Rhode Island the executive is elected annually, in about two thirds of the states the term is two years, in the rest it is four years. The term of the Swiss Executive Council is three years; that of the presidents of the United States and Brazil, four years; the national executive of Chile is chosen for five years; and those of Argentina and Mexico, for six years. The chief executives of the self-governing colonies of Great Britain hold during the pleasure of the crown; and the cabinets in states having the cabinet system of government hold office, of course, so long as they are able to command the support of the legislature, or until they are dismissed by the executive, or the parliament is dissolved or expires by limitation. The average term of the executive in republican states is in the neighborhood of four years, though in the case of the local executives of the North American states it is less. The

[1] "The Federalist," No. 71. [2] "Commentaries," sec. 1433.

one-year terms which prevail in some of the New England states are survivals of the early American notion that annual elections are an essential protection against tyranny and oppression.

Arguments for and against Short Terms

The argument in favor of short tenures for the executive is that the shorter the period of the office the greater the security against abuses of power;[1] and conversely, the longer the term, the less will be the means of enforcing responsibility and the greater the personal ambition of the executive. The belief has always been widespread in democratic countries that executives with long tenures are exposed to a strong temptation to transform their offices by means of a *coup d'état* into monarchical tenures, as Napoleon did when he converted his consulship of ten years into one for life and then into an imperial office. On the other hand, as Judge Story has remarked, the testimony of experience shows that a very short term is, practically speaking, equivalent to a surrender of the executive power, as a check in government, and besides leads to "an intolerable vacillation and imbecility."[2] It is difficult to see what can be said in favor of limiting the term to a single year. No important constructive policy can be formulated and carried through in so short a time; and unless the executive were reasonably sure of a reëlection he would hardly feel warranted in entering upon a new policy which would have to be bequeathed unfinished to his successor. In short, continuity of executive policy and stability of administration are impossible under such conditions. An executive so restricted as to tenure is likely therefore to be timid, weak, lacking in independence, and without a policy. "A man is apt to take a slender interest," said Hamilton, "in so short-lived an advantage and to feel little inducement to expose himself to any considerable inconvenience or

[1] Compare Esmein, "Droit constitutionnel," p. 479.

[2] "Commentaries," sec. 1435. Compare Wilson ("Congressional Government," p. 255), on the "unrepublicanism" of short terms.

hazard." [1] The most, he added, that could be expected of the majority of men in such positions would be the negative merit of not doing harm instead of the positive merit of doing good.[2]

Moreover, unless the practice of reëlection is followed, the office must continually be occupied by an inexperienced executive, since he cannot acquire any considerable degree of familiarity with the duties of the position in so brief a period. Finally, short tenures necessitate a frequent recurrence of elections, with the inevitable distractions and disturbance to business that are inseparable from important political contests.[3] A four-year tenure has much more to commend it. It is a period, observed Chancellor Kent, perhaps reasonably long enough to make the executive "feel firm and independent in the discharge of his trust and to give stability and some degree of maturity to his system of administration" and "certainly short enough to place him under a dire sense of dependence on the public approbation." [4] At all events, it is not long enough, as Judge Story has remarked, to justify any alarms for the public safety.[5]

The Question of Re eligibility

Closely connected with the length of term is the question of reëligibility of the executive to a second term. The constitution of the United States, which fixes the term of the

[1] "The Federalist," No. 71. [2] *Ibid.*, No. 72.

[3] Compare De Tocqueville, "Democracy in America," vol. I, p. 221, on the evils of frequent elections in America.

[4] "Commentaries," vol. I, p. 280.

[5] "Commentaries," sec. 1439. See also Rawle, "On the Constitution," ch. 31. Story expressed a doubt whether in point of firmness and independence the President of the United States would be equal to the task assigned by the constitution in view of his short term. There were important reasons, he said, why he should have a longer term than the state executive, the chief one being the difference in the nature of their duties. The duties to be performed by the President, both at home and abroad, he said, were so various and complicated as not only to require great talents and great wisdom, but also long experience in office, to acquire what may be deemed the habits of administration, and a steadiness as well as comprehensiveness of view of all the bearings of measures. The duties of the state executive, on the contrary, were few and confined to a narrow range. "Commentaries," sec. 1440.

President at four years, expressly declares that he shall be eligible to succeed himself and there is no constitutional limitation as to the number of terms which he may serve. Tradition and custom, however, have limited the number to two, and, with a single exception, no incumbent of the office has ever attempted to break this well-established rule, while several have refused to be candidates for a third term in the face of a public sentiment which demanded their reëlection. This usage, observed Chancellor Kent, has indirectly established by the force of public opinion "a salutary limitation to his capacity for a continuance in office." [1] The constitution of the Southern Confederacy fixed the term of the executive at six years and declared the president ineligible to succeed himself, and this principle has been introduced into the constitutions of some of the Latin American states.[2] Other constitutions, notably those of Argentina, Brazil, and Chile, forbid the executive to succeed himself, but declare him to be reëligible after the lapse of an intervening term.[3] The constitution of Mexico, however, fixes the term at six years,[4] and although nothing is said concerning the reëligibility of the executive, the present incumbent has been continuously reëlected since 1884. The president of the French Republic, although possessing the longest term of any elective executive, is eligible to succeed himself.[5]

Argument against Reëligibility

The principal argument in favor of restricting the executive to a single term is that it would serve as a check upon his personal ambition and prevent him from a "cring-

[1] "Commentaries," vol. I, p. 282.

[2] A proposition to fix the term of the President of the United States at seven years was adopted by a majority of the delegates in the Philadelphia convention, but upon reconsideration the term was reduced to four.

[3] The French Constitutions of 1793 and 1848 made the executive ineligible to succeed himself, though he was eligible to a reëlection after an interval of five years This prohibition was one of the causes which led to the *coup d'état* by Louis Napoleon in December, 1851. See Esmein, *op. cit.*, pp. 479, 543.

[4] By an amendment adopted in 1904. Prior to that date the term was four years

[5] "Loi constitutionnel" of Feb. 25, 1875, art. I.

ing subserviency" to procure his reëlection or from resorting to corrupt intrigues for the maintenance of his power.[1] If the executive may be immediately reëlected, it is contended, the value of short terms is in effect destroyed. Ineligibility to a second term, therefore, would tend to secure greater independence in the executive and at the same time greater security to the people. An executive capable of succeeding himself is exposed to a strong temptation to conduct his administration with the one end in view of securing a reëlection. He is tempted, therefore, to employ the resources at his command, even to the prostitution of his high office for this purpose.[2]

Views of De Tocqueville

Writing on this point more than three quarters of a century ago, De Tocqueville declared: "It is impossible to consider the ordinary course of affairs in the United States without perceiving that the desire of being reëlected is the chief aim of the President; that his whole administration, and even his most indifferent measures, tend to this object; and that, as the crisis approaches, his personal interest takes the place of his interest in the public good. The principle of reëligibility renders the corrupt influence of elective government still more extensive and pernicious.

[1] Story, "Commentaries," sec. 1442; "The Federalist," No. 72; and Rawle, "On the Constitution," ch. 31. "Intrigue and corruption," said De Tocqueville, "are the natural defects of elective government; but when the head of the state can be reëlected, these evils rise to a great height and compromise the very existence of the country." "Democracy in America," vol. I, p. 142.

[2] Compare Esmein, "Droit constitutionnel," p. 478. Thomas Jefferson appears to have entertained the opinion in 1787 that the chief executive ought to be restricted to a single term, though he himself did not scruple to accept a reëlection. "Reason and experience tell us," he said, "that the chief magistrate will always be reëlected if he may be reëlected. He is then an officer for life." Near the end of his life, however, he wrote, "My wish was that the President should be elected for seven years and be forever ineligible afterwards. This term I thought sufficient to enable him, with the concurrence of the legislature, to carry through and establish any system of improvement he should propose for the common good. But the practice adopted, I think, is better, allowing his continuance for eight years with a liability to be dropped at halfway of the term, making that a period of probation." Jefferson's Works, vol. IV, p. 565.

It tends to degrade the political morality of the people, and to substitute adroitness for patriotism."[1] Again he affirmed, what cannot be denied, that "whatever the prerogatives of the executive power may be, the period which immediately precedes an election, and the moment of its duration, must always be considered as a national crisis, which is perilous in proportion to the internal embarrassments and the external dangers of the country." Moreover, if the executive may succeed himself, a large portion of the latter part of his first term will be occupied with matters relating to his candidacy, to the neglect of his official duties. On this point De Tocqueville truthfully remarked that "at the approach of an election the head of the executive government is wholly occupied by the coming struggle; his future plans are doubtful; he can undertake nothing new, and he will only prosecute with indifference those designs which another will perhaps terminate."[2]

Advantage of Reëligibility

Experience, however, shows that the advantages of reëligibility are greater than the disadvantages. By no one have those advantages been more clearly and forcibly stated than by Hamilton in "The Federalist." The reëligibility of the executive is necessary, he declared, to "enable the people, when they see reason to approve of his conduct, to continue him in the station in order to prolong the utility of his talents and virtues, and to secure to the government the advantage of permanency in a wise system of administration." First of all, the restriction of the executive to a single brief term would tend to diminish the inducements to good behavior. "There are few men," observed Hamilton, "who would not feel much less zeal in the discharge of a duty when they were conscious that the advantages of the station with which it was connected must be relinquished at a determinate period, than when they were permitted to entertain a hope of obtaining, by merit-

Hamilton's Argument

[1] "Democracy in America" (tr. by Reeves), vol. I, p. 142.
[2] *Ibid.*, p. 134.

ing, a continuance of them." The desire of reward and fame, he continued, is one of the strongest incentives of human conduct; and the best security for the fidelity of mankind is to make their interest coincide with their duty. Furthermore, the rule of ineligibility would tend to create in the executive a propensity to make the best use of his opportunity, while it lasted, for promoting his personal ends, and he "might not scruple to resort to the most corrupt expedients to make the harvest as abundant as it was transitory." [1] We agree with Hamilton that there is an excess of refinement in the idea of disabling the people from continuing in office those who have entitled themselves to the public approbation and confidence.

If, as Hamilton argued, the executive could expect to prolong his honors by his good conduct he might hesitate to sacrifice his "appetite for gain." But with the "prospect before him of approaching an inevitable annihilation, his avarice would be likely to get the victory over his caution, his vanity, or his ambition." [2]

In the next place the effect would sometimes be to deprive the state of the advantage of a wise and experienced official by compelling him to abandon his office at the very time when by reason of his experience he is best fitted to serve it. It would, says Judge Story, be equivalent to banishing merit from the public councils because it had been tried. "What could be more strange," observed this distinguished jurist, "than to declare at the moment when wisdom was acquired that the possessor of

[1] "The Federalist," No. 72; also Story, "Commentaries," sec. 1443.

[2] "The Federalist," No. 72. Hamilton further remarks that "an ambitious man, too, when he found himself seated on the summit of his country's honors, when he looked forward to the time at which he must descend from the exalted eminence forever, and reflected that no exertion of merit on his part could save him from the unwelcome reverse; such a man, in such a situation, would be more violently tempted to embrace a favorable conjuncture for attempting the prolongation of his power, at every personal hazard, than if he had the probablity of answering the same end by doing his duty."

it should no longer be enabled to use it for the very purpose for which it was acquired."[1] Finally it would, to quote Hamilton again, "operate as a constitutional interdiction of stability in the administration." Every election would be followed by an interruption in the continuity of executive policies and the latter part of each term would be a period of doubt, of weakness, and passive inactivity. The administration, in short, "would drift along without plan or policy.[2]

In conclusion, it may be observed that the wisdom and expediency of restricting the executive to a single term necessarily depend to a large extent upon the length of the term. Manifestly an executive with a term of six or seven years might be made ineligible to a second term with far less impropriety than one whose term is two years. If the term is as long as twenty years, the incumbent ought to be rendered ineligible to succeed himself for the obvious reason that his responsibility would be "greatly diminished and his means of influence and patronage immensely increased so as to check in a great measure the just expression of public opinion and the free exercise of the elective franchise."[3]

IV. THE EXECUTIVE POWER

What is the best constitution for the executive department and what are the powers with which it should be intrusted, said Judge Story, are problems among the most important and probably the most difficult of solution of any involved in the theory of free governments.[4] Con-

[1] "Commentaries," sec. 1444.

[2] "I am so near the time of my retirement from office," said President Jefferson, on the 21st of January, 1809 (six weeks before the expiration of his term), "that I feel no passion, I take no part, I express no sentiment. It appears to me just to leave to my successor the commencement of those measures which he will have to prosecute and for which he will be responsible."

[3] Story, "Commentaries," sec. 1449. [4] *Ibid.*, sec. 1410.

cerning the first of these problems we have already written; it remains now to consider the powers and duties which properly belong to the executive department.

Executive Power Expressly conferred

With regard to certain general principles, the political thought and practice of modern states are in substantial agreement. On one point, however, there is an important difference between the theories which prevail in monarchical states and those which prevail in republics. Generally speaking, in republics only those powers may be exercised by the executive which are expressly conferred by the constitution and laws, or which may be reasonably inferred from those expressly granted, or which may properly be considered as inherent in the nature of the executive office. In states having hereditary executives, on the contrary, there is a large undefined residuary power which goes under the name of the "royal prerogative." This power has been described by Professor Dicey as the "residue of discretionary authority left at any moment in the hands of the king"; that is, what is left of his ancient customary or common law powers.[1] It does not therefore rest upon statutory authority. In certain domains of administration this residuary power is still quite extensive, though the tendency has been to restrict and regulate it until in many cases it is not clear whether the authority exercised is statutory or residuary.[2] In states having elective executives, on the other hand, there is but little of such authority remaining with the executive.

Prerogative

Roughly speaking, we may classify the executive power under the following heads:

Classification of the Powers of the Executive

First, that which relates to the conduct of foreign relations and which we may denominate the diplomatic power.

Second, that which has to do with the execution of the

[1] "Law of the Constitution" (2d edition), p. 353.

[2] Compare Lowell, "The Government of England," vol. I, p. 19.

laws and the administration of the government; this may be denominated the administrative power.

Third, that which relates to the conduct of war and which may be described as the military power.

Fourth, the power to grant pardons to persons charged with or convicted of crime; this may be called the judicial power of the executive.

Fifth, that which relates to legislation, or the legislative power.

The Diplomatic Power

The constitutions of all states intrust the executive, either alone or in conjunction with the legislature or one chamber thereof, with the authority to negotiate treaties and other international agreements with foreign states. Strictly speaking, the treaty-making power is neither purely executive nor legislative in character. It constitutes, as Esmein remarks, a sort of mixed zone occupied at the same time by both the legislative and executive authorities.[1] But whether it be executive or legislative in character, there is practically no difference of opinion with regard to the wisdom of intrusting it to the executive. The legislature, or one chamber of it, however, may very properly be vested with the negative power of ratification as a means of checking the errors or abuses of an unwise, ambitious, or unscrupulous executive, though owing to the peculiar nature of the treaty-making power, the legislature cannot wisely be allowed a direct participation in the negotiation. Alexander Hamilton has well observed that "accurate and comprehensive knowledge of foreign politics, a steady and systematic adherence to the same views, a nice and uniform sensibility to national character, decision, secrecy, and dispatch are incompatible with the genius of a body so variable and so numerous." The "fluctuating and multitudinous composition of the legislature," he continues, "forbid us to expect in it qualities which are essential to

[1] "Droit constitutionnel," p. 568.

the proper execution of such a trust."[1] Nevertheless, as Story has observed, "it is too much to expect that a free people would confide to a single magistrate, however respectable, the sole authority to act conclusively upon the subject of treaties.[2]

Participation of the Legislature

In a few monarchical states like Great Britain, this power is exclusively in the hands of the executive, parliament having no share except where legislation may be necessary to perfect the treaty or carry it into effect. In such states, therefore, the executive is both the negotiating and ratifying authority. But in the majority of states, monarchies as well as republics, the assent of the legislature or one branch of it is essential to the validity of all treaties or certain classes of them. In the United States, for example, the consent of the Senate is required by the constitution, though the right of the executive to conclude certain kinds of international agreements independently of the senate has long been acquiesced in.[3] In practice the power of the United States Senate is not restricted to the mere negative function of ratifying or rejecting the treaties negotiated by the executive, but it claims and has many times exercised the right of amending those submitted for its approval.[4] The House of Representatives likewise exercises an indirect share in the treaty-making power through its right to give or withhold its consent to legislation which may be necessary to carry into execution a treaty; such, for example, as one which stipulates for an appropriation of money. Moreover, the necessity for its approval of treaties which have to do with the regulation of foreign com-

[1] "The Federalist," No. 75. Compare also Esmein, "Droit constitutionnel," p. 568; and Kent, "Commentaries," vol. I, pp. 285–286.

[2] "Commentaries," sec. 1512.

[3] See an article by Professor J. B. Moore on "Treaties and Executive Agreements," in the "Political Science Quarterly," for September, 1905; also his "Digest of International Law," secs. 752–753; and S. B. Crandall, "Treaties, Their Making and Enforcement," pp. 86–88.

[4] For examples, see Crandall, "Treaties, Their Making and Enforcement," p. 71

merce, such as commercial reciprocity agreements, is now admitted by both the Senate and the executive.

In the German Empire treaties negotiated by the emperor require the assent of the legislature only when they deal with subjects upon which the *Reichstag* is empowered to legislate; and in France when they are treaties of peace and commerce or involve the finances or territory of the state or affect the personal or property rights of Frenchmen in foreign states. The French chambers, however, cannot modify or amend treaties submitted for their consideration and must approve or reject them as a whole.[1]

In all states the executive is vested with the power of appointing and receiving diplomatic representatives and of representing the state in all international relations; and the power to "receive" is not merely a ceremonial function, but includes the important right to recognize or refuse to recognize the independence of the state from which the representative is accredited.

The Administrative Power

In the domain of internal administration the principal power and duty of the executive is to direct and supervise the execution of the laws. He is the chief of the administration and the responsible head of the civil service. As such he exercises a wide power of control over the personnel of the administrative service through his power to appoint, direct, and remove his subordinates.[2] In most republican states and in a few of the monarchical type the power of the

[1] Esmein, "Droit constitutionnel," p. 577.

[2] The French make a distinction between the *political* or *governmental* functions of the executive and the purely *administrative* functions. The former category includes such matters as the summoning and opening of the legislative chambers, the conduct of foreign relations, the disposition of the military forces, the exercise of the right of pardon, etc. The administrative authority, on the other hand, embraces all those matters which have to do more directly with the strict administration of the government, such as the appointment, direction, and removal of officers; the issue of instructions and ordinances; and, in general, all acts relating more directly to the execution of the laws. Cf. Goodnow, *op. cit.*, vol. I, pp. 50–51, and Duguit, "Droit constitutionnel," sec. 41.

chief executive is limited by the requirement that his appointments shall be approved by one branch of the legislature. Thus in the United States the nominations of the President must be confirmed by the Senate; and this practice is imitated in many of the Latin American constitutions and in those of the component states of the American republic. The power of the President of the United States to remove, however, is not limited by the necessity of obtaining the consent of the Senate, as is the case in making appointments.

Appointment of Public Officials

There is no difference of opinion in regard to the wisdom of executive appointment of the higher officials, though as to whether he should be independent in his choice or subject to the control of a council or a branch of the legislature, there is no such concurrence of opinion. In defense of the method provided by the constitution of the United States, Hamilton observed that "it is not easy to conceive a plan better calculated than this to promote a judicious choice of men for filling the offices of the Union and it will not need proof that on this point must essentially depend the character of its administration." "One man of discernment," he declared, "is better fitted to analyze and estimate the peculiar qualities adapted to particular offices than a body of men of equal or perhaps even of superior discernment." "The sole and undivided responsibility of the executive will," he went on to say, "naturally begets a livelier sense of duty and a more exact regard to reputation. He will inquire with more earnestness and decide with more impartiality. He will have fewer personal attachments to gratify than a body of men, and will be less liable to be misled by his private friendships and affections; or, at all events, his conduct will be more open to scrutiny and less liable to be misunderstood." Nevertheless, the provision that the nominations of the executive should receive the assent of the Senate, Hamilton admitted would be "an excellent check upon a spirit

of favoritism in the President and would tend greatly to preventing the appointment of unfit characters."[1]

Power of Direction

Flowing from the right of the executive to select and dismiss his subordinates is the right to direct them. This power varies in extent in different countries, and in the same state it often varies as regards different officials. In monarchies, and in republics like France, where monarchical traditions are still strong, the directing power of the executive is very great. In the United States the power of the executive to direct his subordinates is, however, often limited by legislative acts which specify in more or less detail the powers and duties of such officials. Thus the act of Congress organizing the Treasury Department contains no reference to any presidential power of direction and indicates that the administration of the finances is to be kept under the control of Congress rather than under the executive.[2] Various statutes confer upon the President specific authority to issue instructions and orders to the heads of departments. But aside from specific grants of authority, the President has also a certain power of direction which is inherent in the nature of his office and for which he is not obliged to show statutory authority.[3]

The Ordinance Power

An important domain of executive action which falls within the field of civil administration is the ordinance power; that is, the power of issuing general rules, either for regulating matters which have not been dealt with by the legislature, or for supplementing and filling in the details of existing statutes.[4] In monarchical states and in some republics like France the executive has a large independent power of legislation in regard to various matters which,

[1] "The Federalist," No. 75. See also Story, "Commentaries," sec. 1529; Kent, "Commentaries," vol. I, p. 288.

[2] Cf. Fairlie, "National Administration of the United States," p. 16.

[3] "Opins. of Attys. Gen." vol. 6, p. 365.

[4] Goodnow, "Comparative Administrative Law," vol. I, p. 28; and Fairlie, "National Administration of the United States," pp. 21 ff.

it is believed, can be better dealt with by executive ordinance than by act of the legislature.[1] In the United States, however, the executive has little, if any, power of this nature, his authority to issue ordinances being expressly delegated by act of Congress. In most of the European states the acts of the legislature rarely descend to details in laying down rules, but merely embody the main essentials, leaving it to the executive to supplement the statute and supply the details by means of ordinances. Consequently the authority of the executive is very much greater than in America, where the statutes are more elaborate and full of detail.[2] An American statute is usually framed so as to anticipate and provide for every possible contingency, and consequently leaves little discretion to the executive. Nevertheless, the ordinance power of the President of the United States is much larger than is commonly supposed. Thus, in pursuance of authority delegated by Congress, he issues codes of regulations for the government of the army and navy, the postal service, the patent office, the pension office, the land office, the Indian service, the customs and internal revenue service, the consular service, the administrative civil service, and various other branches of the administration.[3] Comparatively few persons realize the vastness and importance of this mass of executive-made law, much of which binds

[1] On the nature of the ordinance power, the *pouvoir réglementaire* of the French, see Berthélemy, "Le Pouvoir réglementaire du Président de la République"; also his "Traité élémentaire de Droit administratif," pp. 101–104; Esmein, "Droit constitutionnel," pp. 509–518; Pradier-Fodéré, "Précis de Droit administratif," pt. II, ch. 2; Hauriou, "Droit administratif," pp. 204 ff.; Duguit, "Droit constitutionnel," secs. 40, 140; Jellinek, "Gesetz und Verordnung," pp. 376 ff. (pt. II, ch. 6); Mareau, "Le Règlement administratif"; and Raiga, "Le Pouvoir réglementaire du Président."

[2] The constitution of Prussia (art. 45), for example, gives the king power to decree the measures necessary to the execution of the law. The constitutions of Belgium (art. 67) and Spain (art. 45) contain similar provisions. In pursuance of these provisions a large mass of rules having the force of law have been issued.

[3] Compare Fairlie, "National Administration of the United States," pp. 21–23, and Lieber on "Executive Regulations."

and regulates, not only the conduct of the great body of officials, but the mass of private citizens as well. In England, likewise, the "statutory Rules and Orders" of an administrative character issued by the public authorities, and particularly the Departments of State, such as the Home Office and the Local Government Board, fill many volumes.[1]

The Military Power

The military power of the executive everywhere includes the supreme command of the army and navy and other military forces of the state. In some monarchical countries, like Great Britain, it embraces also the right to declare war. In the United States, however, this latter authority is vested in Congress, though it is possible for the executive in his conduct of the foreign relations of the country to bring about a condition of affairs which will make war a practical necessity. In the German Empire the executive may declare offensive war only with the consent of the *Bundesrath*, and in France the assent of both chambers is necessary.[2] In both countries it seems to be admitted that the executive can declare defensive war without the necessity of obtaining the consent of the legislature. Nowhere, however, even where the executive may initiate hostilities, can extensive war be waged for any length of time without the approval of the legislature, since it and not the executive controls the source of supply. Everywhere the right of the executive to dispose of the forces, plan and direct the campaigns, select the commanders, establish blockades, and, in general, do whatever in his judgment may be necessary or expedient to destroy the resources of the enemy and prosecute the war to a successful conclusion, is recognized. Moreover, it belongs to the executive to occupy, hold, and govern temporarily those portions of the enemy's

[1] Cf. Lowell, "Government of England," vol. I, p. 20. Likewise the "new statutory" orders in Council constitute an important part of executive-made law.

[2] For a review of French thought and practice on this point, see Esmein, "Droit constitutionnel," pp. 583–588, and Duguit, "Droit constitutionnel," pp. 992–995.

country which have fallen into the hands of the armed forces, and, to this end, he may displace the established civil authority and institute military government, and invest it with such powers as he may choose to confer upon it.[1] Finally, during the existence of the war it belongs to the executive to suspend the ordinary civil guarantees which the constitution has established for the protection of the individual in time of peace. As commander of the armed forces he may establish martial law, suspend the writ of habeas corpus, declare certain acts ordinarily innocent to be military offenses and order the arrest of persons committing them, suppress newspapers, punish disloyalty, and the like.

War always brings a vast addition to the power of the executive and enables him to take on something of the character of a dictator. Nevertheless, the experience of the past and the testimony of political thinkers almost without exception have concurred in defending the practice of concentrating the military power in the hands of a single person. In the military organization of the state dualism is out of place. "Of all the cares or concerns of government, the direction of war," said Alexander Hamilton, "most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a useful and essential part in the definition of the executive authority."[2] "The command and application of the public force," said Chancellor Kent, "to execute the laws, to maintain peace, and to resist foreign invasion are powers so obviously of an executive nature and require the exercise of qualities so peculiarly adapted to this department, that they have always been exclusively

[1] Cf. Thomas, "A History of Military Government in newly acquired Territory of the United States," pp. 15–20.

[2] "The Federalist," No. 74.

appropriated to it in every well-organized government on earth."[1]

The Pardoning Power

Finally, the right of pardon or clemency (the *droit de grâce* of the French) is by common consent regarded as a natural and necessary part of the executive power. Beccaria stood almost alone among the political writers of his time in condemning the practice of granting pardons to those whom the courts have convicted of crime.[2] Montesquieu, while considering it to be one of the "most beautiful and necessary attributes of monarchs," did not regard it as having any place in republics.[3] Some English lawyers of high standing, observed Chancellor Kent, have strangely concluded that it cannot exist in a republic because "nothing higher is acknowledged than the magistrate." But, as Kent very properly adds, "It may be fairly insisted that the power may exist with greater safety in free states than in any other forms of government, because abuses of the discretion unavoidably confided to the magistrate in granting pardons are better guarded against by the sense of responsibility under which he acts."[4]

Justification of the Pardoning Power

Considerations of justice and humanity require that the principle of clemency shall have a place in the administration of justice. No system for the administration of justice is or can be free from imperfections. It is impossible, says the French scholar Esmein, that there should not occur at times in the administration of justice judicial errors which would result in the condemnation of innocent persons. One purpose of the pardon is to correct such errors. It is impossible also, as Esmein remarks, that the criminal

[1] "Commentaries," vol. I, p. 283.

[2] See his "Des Délits et des Peines," ch. 21.

[3] "Esprit des Lois," bk. VI, ch. 21.

[4] "Commentaries," vol. I, p. 284. The English lawyer referred to by Kent was doubtless Blackstone, who said, "In democracies this power of pardon can never subsist, for there nothing higher is acknowledged than the magistrate who administers the laws, and it would be impolitic for the power of judging and of pardoning to center in one and the same person."

law in fixing the punishment of crime should foresee all the extenuating circumstances that may have attended the commission of a particular offense.[1] No man in his senses, says Judge Story, will contend that any system of laws can provide for every possible shade of guilt a proportionate degree of punishment. "The most that ever has been and ever can be done is to provide for the punishment of crimes by some general rules and within some general limitations."[2]

Reason for vesting the Pardoning Power in the Executive

The power of pardon then being required by considerations of humanity and sound public policy, the same considerations conspire, says Hamilton, to dictate that this benign prerogative should be fettered or embarrassed as little as possible.[3] "One man," he adds, "appears to be a more eligible dispenser of the mercy of government than a body of men," and this has not only been the testimony of practically all political writers, but for the most part it has been the practice of states. In some of the states of the American Union the executive in the exercise of this power is, however, associated with an advisory board which is charged with investigating applications for clemency and making recommendations to the executive. Many constitutions except the offense of impeachment from the pardoning power of the executive, and a few make the same exception in the case of treason. Impeachment is a punishment usually inflicted by the legislature for crimes committed by high officials, and the purpose of the exception is to remove the temptation of the executive to shield public officials, especially those of his own selection, who might be his instruments or his comrades in crime.[4] Treason being a crime "levelled against the immediate being of the society, when the laws have once ascertained

Exceptions

[1] "Droit constitutionnel," p. 532.

[2] "Commentaries," sec. 1494; also Kent, "Commentaries," vol. I, p. 284.

[3] "The Federalist," No. 74.

[4] Nevertheless the constitution of the French Republic allows the president to grant pardons to ministers who have been impeached.

the guilt of the offender, there seems a fitness in referring the expediency of an act of mercy towards him to the judgment of the legislature."[1] With these exceptions the power of pardon is general and unqualified. So far as the President of the United States is concerned, it may be exercised before as well as after conviction, and it usually embraces the remission of fines and forfeitures and the granting of reprieves and commutations. It also includes the right of amnesty, or the right of absolving by general proclamation large numbers of persons from the consequences of their acts — a power which considerations of humanity and public policy make a necessity in times of internal disturbance and insurrection.[2]

Extent of the Power

V. RELATION OF THE EXECUTIVE TO THE LEGISLATURE AND TO THE JUDICIARY

Participation of the Executive in the Legislative Power

"The relation of the supreme executive to the legislative organ," observes Sidgwick, "is one of the knottiest points in constitutional construction."[3] In practice there is no state in which the sphere of the executive power is totally separate from and independent of that of the legislature. Everywhere the executive is given a certain power of control over the proceedings of the legislature and of participation directly or indirectly in the function of legislation. Conversely, in all states the executive is subject in certain respects to the control of the legislature.[4]

The participation of the executive in the legislative function consists in the power to summon the legislature and to open, adjourn, and prorogue its sessions and, in countries having the cabinet system of government, to dissolve the

[1] Hamilton, "The Federalist," No. 74.

[2] Compare, on this point, Esmein, "Droit constitutionnel," pp. 533–534.

[3] "Elements of Politics," p. 429.

[4] On the subject of legislative control of the executive, see St. Girons, "La Séparation des Pouvoirs," pp. 352 ff. On the subject of the executive as the agent of the legislature see Berthélemy, "Le Rôle du Pouvoir executif dans les Républiques modernes," bk. II, ch. 1.

mandates of its members and to order new elections. In republican states the power of the executive to convene the legislature is usually limited to the calling of extraordinary sessions in times of emergency for the consideration of special matters which need immediate attention. In all such states either the constitution or the statutes prescribe the date for the assembling of the regular sessions of the legislature, and no call of the executive is necessary. In states having the cabinet form of government, however, the legislature usually convenes only upon a call of the executive, though in most cases the executive is required to summon it at certain stated intervals.[1]

Assembling of Legislature, etc

In the former case the legislature assembles automatically, as it were, and opens its proceedings without the participation of the executive; in the latter, the formality of opening the session is a function of the executive or his representative, who performs the duty with more or less ceremony, such as the reading of a speech from the throne. In the European monarchical countries the right of the executive to prorogue the sittings of the legislature, that is, to suspend the session to a certain date in the future, is generally provided for by constitutional provision, though in republics such a power is rarely recognized as belonging to the executive. In countries having the cabinet system of government the executive is usually invested also with the power of adjourning the legislature subject to certain limitations.[2]

In states having the presidential system of govern-

[1] In Great Britain, for example, the crown must convoke Parliament annually; in the German Empire the emperor must call the two chambers together once each year; and in France the constitution requires the chambers to assemble annually, but the president must summon the chambers in extraordinary session when a majority of the members demand it.

[2] Thus in the German Empire the emperor is forbidden to adjourn the *Reichstag* more than once during the session nor for a longer period than thirty days without its consent. In France the president is limited to two adjournments during the session, neither of which may exceed one month in duration.

ment the power of the executive is usually limited to adjourning the legislature only when the two chambers are unable to agree upon a time of adjournment. In all states having the cabinet form of government the executive is vested with the power of dissolving the legislature, or rather the popular chamber, that is, of terminating the mandates of the members and thus putting an end to the legal existence of the chamber. But everywhere the exercise of this power is subject to certain limitations. With a few unimportant exceptions it can be done only upon the advice of a responsible ministry, and in most instances the dissolution must be followed within a certain period by the ordering of new elections and the convening of the new parliament. Theoretically, the British executive is not subject to any limitations regarding the ordering of new elections and the summoning of the new parliament, but practically the conditions of the British parliamentary system make it a necessity.[1] Since the upper chamber under the cabinet system rarely rests upon a popular basis, it is, of course, unaffected by a dissolution of the lower chamber.

In the republics of America where the presidential system of government prevails, the right of the executive to dissolve the legislature or either chamber of it is not recognized. There the mandates of members of the legislature are terminated only by the legal expiration of the terms for which they are chosen or by resignation or expulsion.[2] The more direct participation of the executive in legisla-

[1] In the German Empire the emperor is forbidden by the constitution to dissolve the *Reichstag* without the consent of the *Bundesrath*, and the dissolution must be followed by the ordering of new elections within sixty days and the assembling of the new *Reichstag* within ninety days. In France the president is empowered to dissolve the Chamber of Deputies only with the consent of the senate, but there are no express constitutional requirements as to the ordering of new elections or the convening of the newly elected chamber.

[2] On the subject of convening, opening, proroguing, adjourning, and dissolving legislative assemblies, see Esmein, "Droit constitutionnel," pp. 542–564. Duguit, "Droit constitutionnel," sec. 137, and St. Girons, "La Séparation des Pouvoirs," pp. 336 ff.

tion consists in furnishing the legislature with information concerning the legislative needs of the country; in recommending measures for its consideration; sometimes, though rarely, in the initiation of legislative projects; in approving or disapproving its acts and in promulgating those which are approved.

Executive Recommendations of Legislative Measures

The constitution of the United States requires the chief executive to give the Congress, from time to time, information of the state of the Union and to recommend for its consideration such measures as he shall deem necessary and expedient. A similar provision is in substance embodied in the constitutions of most of the Latin American republics. This "information," together with the accompanying recommendations, is presented in a more or less elaborate annual message submitted to the Congress at the beginning of its regular session and in special messages transmitted from time to time during the course of the session. The degree of consideration bestowed by the Congress upon the recommendations of the executive, and the extent to which the measures proposed by him are adopted, depend, of course, upon the degree of political harmony existing between the executive and the legislature, the standing and influence of the executive in the country and with the Congress, the wisdom of his recommendations, and the aggressiveness with which he advocates the adoption of his views. The influence of certain American executives upon the course of legislation has been very considerable, while that of others has not been appreciable.[1]

In the United States

The wisdom of requiring the executive to furnish the legislature with information concerning the state of public affairs and of recommending legislation to meet the needs and conditions of the public service rests on the obvious fact that the executive from the very nature of his office

[1] For a systematic study of this subject the reader is referred to a monograph of M. Henri Bosc, entitled, "Le Pouvoir législatif des Présidents des États-Unis" (1905).

must have more extensive sources of information in regard to domestic and foreign affairs than the legislature can be expected to possess. "The true workings of the laws," observed Judge Story, "the defects in the nature or arrangements of the general systems of trade, finance, and justice, and of the military, naval, and civil establishments are more readily seen and are more constantly under the view of the executive, than they can possibly be of any other department. There is great wisdom, therefore, in not merely allowing, but in requiring, the President to lay before Congress all facts and information which may assist their deliberations, and enabling him at once to point out the evil and to suggest the remedy." [1]

Speeches from the Throne in Monarchical Countries

Corresponding in some degree to the "messages" of the executive in republican states is the customary speech from the throne delivered by the monarchs of European countries at the opening of parliamentary sessions. These speeches from the throne are little more, however, than formal and perfunctory reviews of legislative and executive policy and statements of measures to be laid before the legislature at the ensuing session. They are frequently written by the prime minister or some other member of the cabinet, and are thus merely announcements of ministerial policies rather than executive recommendations. In states where the cabinet system prevails the real executive — that is, the ministry — enjoys, of course, the right of initiating legislative projects and does in fact prepare and introduce all important measures.

Executive Initiation of Legislative Projects

In the German Empire, the executive has the right of initiating legislative projects directly, through the agency of those members in the upper chamber who are his representatives and appointees. In most non-parliamentary states, however, like the republics of America, none of the members of the legislature are the appointees of the execu-

[1] "Commentaries," vol. I, sec. 1561. See also Tucker's Blackstone, App 343–345; and Rawle, "On the Constitution," ch. 16.

tive, and his official advisers have no right to seats in either chamber. But there are always in the legislature spokesmen for the President, "administration members," as they are sometimes called, through whom his measures may be laid before the legislature and their adoption advocated.

The Veto Power

The most important power of the executive in connection with legislation arises from the almost universal practice of making his approval essential to the validity of the acts of the legislature. This power of the executive to disapprove acts of the legislature is popularly known as the "veto," or, as it was called by the writers of "The Federalist," the President's "qualified negative."

Absolute Qualified Suspensive

In a few states, like Great Britain, the veto power is absolute and cannot be overcome by any vote of the legislature, however large. There, however, owing to the thoroughgoing development which the cabinet system has undergone, the power of disapproval has necessarily fallen into desuetude and will probably not be exercised again unless in very exceptional cases.[1] In the great majority of constitutions the veto power of the executive is qualified, that is to say, it may be overridden by the legislature, provided an extraordinary majority of the members, usually two thirds, concur in repassing the measure disapproved. In France, the veto of the executive is merely suspensive in character, and is employed simply to compel reconsideration by the legislature of measures passed by it and disapproved by the President. "It is," says Esmein, "a preservative against possible abuses and dangers of the parliamentary initiative."[2] A repassage of the vetoed measure by an ordinary majority of the members makes it a valid law, notwithstanding the interposition of the executive veto.

[1] The veto power of the crown has not, however, been lost by disuse, for it is a "fundamental principle of the English constitution that the crown can lose no rights by its own negligence." Burgess, "Political Science and Constitutional Law," vol. II, p. 203. See also Lowell, "Government of England," vol. I, pp. 25–26, where the conditions under which the veto might still be employed are set forth.

[2] "Droit constitutionnel," p. 540.

Purposes of the Veto

The principal purposes of the veto are to prevent hasty and ill-considered action by the legislature, and to furnish the executive with the means of defense against the encroachments of the legislature. The executive is presumed to know better than the legislature what are his own powers and prerogatives;[1] and if his claim to a particular prerogative is denied, the ultimate decision ought to be made by the courts, not by the legislature. Hamilton pointed out that there was a strong tendency — a tendency "almost irresistible" in republican governments — for the legislative authority to absorb every other. "The representatives of the people," he observed, "are sometimes inclined to fancy that they are the people themselves and to assert an imperious control over the other departments. As they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the constitution."[2] A "mere parchment delineation" of the boundaries of the three departments, Hamilton went on to remark, is insufficient, and hence each must be furnished with "constitutional arms" for its own defense against the "depredations of the other."[3] Without the power of negative the executive might be gradually stripped of his authority and even annihilated by successive resolutions of the legislature. The possibility of this danger is all the greater in a country

[1] Speaking of the veto power, Daniel Webster said, "It was vested in the President doubtless as a guard against hasty and inconsiderate legislation and against any acts inadvertently passed which might seem to encroach on the just authority of the other branches of the government." Works, vol. I, p. 255. Compare also Burgess, who observes that "it ought to be employed chiefly to prevent encroachments by the legislature upon the constitutional prerogatives of the executive and to prevent unwise legislative changes in the existing means and measures of the administration." "Political Science and Constitutional Law," vol. II, p. 255.

[2] "The Federalist," No. 70. See on this point also De Tocqueville, "Democracy in America," vol. I, p. 125.

[3] "The Federalist," No. 73. See also Story, "Commentaries," vol. I, sec. 884; also Kent, "Commentaries," vol. I, lect. XI.

like the United States, where the executive has neither the right of adjournment, of prorogation, nor of dissolution.[1] Reason and experience teach that the powers of neither department ought to be dependent upon the will of the others, but each ought to possess a constitutional and effectual power of self-defense against the encroachments of the rest.

A Check upon Hasty and Unwise Legislation

The veto power, continued Hamilton, not only serves as a "shield to the executive," but it furnishes an additional security against the enactment of unwise legislation and establishes a salutary check upon the evil effects of faction, precipitancy, and want of consideration. Where, however, the constitutional rights of the executive are not involved, in short, where the difference of opinion between the executive and the legislature relates to the wisdom or expediency of the measure, the veto power should be used sparingly. A wise executive will be inclined not to set his own judgment against that of the legislature, but will yield to its views of public policy. The line of cleavage, however, is difficult to draw.[2]

Argument in Defense of the Veto

Replying to the objection sometimes urged against the veto power, that it is not to be presumed that a single man will possess more virtue and wisdom than the entire legislature, Hamilton said, "The propriety of the thing does not turn upon the supposition of superior wisdom or virtue in the executive; but upon the supposition that the legislature will not be infallible; that the love of power may sometimes betray it into a disposition to encroach upon the rights of the other members of the government; that a spirit of faction may sometimes pervert its deliberations; and that impressions of the moment may sometimes hurry it into measures which itself would condemn."[3] To the argument sometimes advanced that

[1] Compare on this point Esmein, "Droit constitutionnel," p. 507.

[2] Compare Burgess, vol. II, p. 255.

[3] Compare also Kent, vol. I, pp., 240–241; Story, vol. I, sec. 885.

the veto power of the executive may be employed to prevent the enactment of good laws as well as bad ones, it may be replied that the power cannot be effectually exercised if an unusual majority of the legislature is favorably disposed toward the law vetoed. Such an argument, said Hamilton, will have little weight with those who have a proper appreciation of the "mischiefs of that inconstancy and mutability in the laws which form the greater blemish in the character and genius of our governments.[1] We should rather look with favor upon every device intended to restrain the evils of our legislation" — evils which since Hamilton's day have certainly grown to be of the first magnitude. Where the veto power is qualified, that is, where the objection of the executive may be overcome by the legislature, a larger number than a bare majority concurring, the means is provided for enabling the executive to point out the defects of legislation submitted for his approval and of compelling a reconsideration by the legislature of its former action. In short, the qualified negative, when exercised, is in effect an appeal to the legislature itself and merely asks a revision of its own judgment.[2] Especially is this true in the United States, where the executive is obliged to state the reasons for his objections and where the legislature is *required* to reconsider measures vetoed.

Promulgation and Publication

Finally, it is the constitutional duty of the executive in most states to promulgate and publish the acts of the legislature. Promulgation, says Esmein, is the act by which the chief executive declares executory (*exécutoire*) a law regularly passed by the legislative body, and gives to the agents of the state authority to put it into effect. It is in the nature of a decree whereby the executive certifies that the law has been properly passed and by which he commands its execution. It is a juridical act, an essential

[1] "The Federalist," No. 73; Story, "Commentaries," vol. I, sec. 886.

[2] Compare Story, "Commentaries," vol. I, sec. 888.

step in the process of making the law ready for execution. The necessity of promulgation, he observes, is a logical consequence of the principle of the separation of powers. The law is complete as soon as it has been voted by the legislative body, but it is not binding until it has been promulgated.[1] Publication, on the other hand, is the act of the executive by which the law that has been passed and promulgated is brought to the knowledge of the people, and is usually accomplished through the medium of a governmental gazette — in France, the *Journal officiel*.

French and German Practice

The constitution of France requires the President of the republic to promulgate the laws, but leaves to his own discretion the manner of promulgation, subject to the limitation that not more than one month may intervene between the date upon which the law is transmitted to him by the legislature and the date of publication, which period may be reduced to three days when both chambers shall have voted that promulgation is urgent. Likewise, the constitution of the German Empire confers upon the emperor the power of engrossment (*Ausfertigung*), promulgation, and publication. By the act of engrossment he furnishes the bill with the seal of authenticity; that is, certifies that it has been enacted by the legislative body in accordance with the prescriptions of the constitution governing legislative procedure.[2] The German commentators differ as to whether in case a law is free from formal defects but possesses

[1] "Droit constitutionnel," p. 503. "Promulgation," says Duguit, *op. cit.*, p. 1001, "is the act by which the executive affirms by means of a consecrated formula that the law has been regularly voted by the chambers, that it must be applied by the administrative and judicial authorities and that it is obligatory on all." It is the custom in France to cite a law by the date of its promulgation though some authors maintain that promulgation is really the first act of execution and hence the date of the law is the date when it was voted by the last chamber. See, *e.g.*, Du Crocq, "Études de Droit public," pp. 1–17; also his "Droit administratif," 7th ed., vol. I, p. 64.

[2] Laws of July 16, 1875, art. 7, sec. 1.

material defects, that is, has not been constitutionally passed, the emperor may withhold the formula of authentication and refuse to promulgate such a law.[1] But the better opinion seems to be in favor of the view that such a power belongs to the emperor. It is true that he has no veto power, as emperor, but it is his duty to inquire whether that which purports to be a law has in fact been passed in a constitutional manner.[2] Publication of the law is effected through the Imperial Gazette (*Reichsgesetzblatt*), and the law goes into effect fourteen days after publication. No law possesses any binding force until so published. The constitution of the United States contains no provision concerning the promulgation of the laws by the executive. By an act of Congress the duty has been imposed upon the Secretary of State of publishing the law in certain newspapers as soon after its approval by the President as possible. Publication and promulgation are thus treated as identical in form, and the duty is purely ministerial.

Relation of the Executive to the Judiciary

Turning now to the relation of the executive to the judiciary, we may note that the responsibility of an elective executive may be either for criminal acts committed by him or for his political policies. We may lay it down as a proposition of almost universal application that the chief executive cannot be subjected to the control of the courts either for his criminal acts or his political policies. It is a general principle of public law that the chief executive should be exempt from the jurisdiction of any court or magistrate so long as he remains in office.

Immunity of the President from Judicial Control

In the United States the President is responsible to but one body for his criminal acts, namely, the Senate organized as a court of impeachment — a court whose jurisdic-

[1] See Laband, "Staatsrecht des deutschen Reiches," vol. I, sec. 56; and Schulze, "Lehrbuch des deutschen Staatsrechts," p. 119.

[2] Compare Howard, "German Empire," p. 119; also Burgess, "Political Science," vol. II, p. 279.

tion is limited to the removal of the President from office and his disqualification from again holding public office.[1] He cannot be arrested or in any manner restrained of liberty or interfered with by the order of any court or compelled to obey any judicial process or to give evidence either by personal testimony or deposition in any court. The courts of the United States have uniformly declined to issue processes against him or to restrain him by injunction or in any way control his discretionary authority.[2] The immunity of the President, however, from responsibility to the courts for his criminal acts ceases with the expiration of his term of office. As soon as he becomes a private citizen, the courts may take jurisdiction of his person and compel him to answer for his misconduct. Moreover, the courts have no scruples against inquiring into the legality of the orders and regulations issued by him and of declaring them null and void when in their opinion they are not authorized by the constitution and laws. Furthermore,

[1] It is not quite clear whether the power of the House of Representatives to impeach the President for treason or felony and other high crimes and misdemeanors and the Senate to try him for such offenses includes acts which are primarily political, that is, acts which in the judgment of Congress constitute official misconduct rather than violations of the laws. During the trial of Andrew Johnson, one party in Congress asserted the right to try the President for other offenses than those against the common or statute law which were not indictable, but whether their position was defensible from a constitutional point of view there is a difference of opinion. Compare Dunning, "Civil War and Reconstruction," chapter on impeachment of President Johnson; and Dewitt, "The Impeachment and Trial of Andrew Johnson," pp. 365–366.

[2] Marbury *v.* Madison, 1 Cranch 170; Mississippi *v.* Johnson, 4 Wallace 475; Goodnow, "Comparative Administration Law," vol. II, p. 208; and Finley and Sanderson, "The American Executive," ch. 4. In some of the American states the courts have claimed and exercised the right to issue the writ of mandamus against the executive to compel him to perform a purely ministerial duty; but if the governor should resist, it is difficult to see how the judiciary could enforce its orders. It would only bring about a conflict between the executive and the courts which would end in the defeat of the judiciary. Other courts have asserted the right only where the executive does not object to the issue of the mandamus. Everywhere, however, the courts take the view that they have no control whatever over the purely discretionary authority of the executive.

the immunity enjoyed by the chief executive does not belong to his subordinates. Over them the courts freely exercise control, and the orders of the President are no defense for violations of the constitution and laws by them. As the President acts for the most part through subordinates, the courts are thus enabled to restrain him from administering the government in violation of the constitution and the laws.

Criticism of this Principle

The exemption of the executive from the control of the courts has been criticised by some doctrinaires as a survival of the monarchical doctrine that "the king can do no wrong," and hence as being dangerous and inconsistent with the theories of republican government. Experience and reason, however, teach that the principle rests upon considerations of political necessity and sound public policy. It is impossible to subject the supreme head of the government to the control of the courts without impairing his independence, interfering with the discharge of his high duties, and destroying the unity of the executive power. To attempt it would lead to useless conflicts between the executive and the judiciary, since, possessing as he does the machinery of execution, he may successfully resist the execution of judicial process directed against him or pardon himself of any punishment which a court might attempt to inflict upon him. The experience of the past shows that the dangers prophesied from the personal independence of the executive are mostly imaginary, that they are, indeed, far less than those which would follow from subjecting him to the constant interference of the courts and exposing the people to the dangers of anarchy.[1]

[1] Compare Burgess, *op. cit.*, vol. II, pp. 246–247; and Finley and Sanderson, "The American Executive," p. 48.

CHAPTER XVII

THE JUDICIARY

Suggested Readings: Ashley, "Local and Central Government," ch. 12; Baldwin, "The American Judiciary," chs. 1–7; Berthélemy, "Traité élémentaire de Droit administratif," bk. III, ch. 1; Bluntschli, "Allgemeines Staatsrecht," bk. V, ch. 1; Burgess, "Political Science and Constitutional Law," pp. 347–368; Coxe, "The Judicial Power and Unconstitutional Legislation," pt. II; Dicey, "Law of the Constitution," lect. V, also his "Law and Public Opinion in England," lect. XI; Duguit, "Droit constitutionnel," secs. 36, 48; Esmein, "Droit constitutionnel," pt. II, ch. 6; "The Federalist," Nos. 78 and 79; Goodnow, "Principles of Administrative Law," bk. VI; Hare, "Constitutional Law," vol. I, lect. VIII; Kent, "Commentaries," lect. XIV; Laveleye, "Le Gouvernement dans la Démocratie," vol. I, bk. VI, ch. 19; Lieber, "Civil Liberty and Self-government," ch. 18; Lowell, "Government of England," vol. II, chs. 59–62; Meyer, "Deutsches Verwaltungsrecht," pt. I, secs. 9–15; Ordronaux, "Constitutional Legislation," ch. 7; Posado, "Tratado de Derecho Politico," vol. II, bk. VI, ch. 5; Powell, "Conclusiveness of Administrative Determinations," "American Political Science Review," vol. I, pp. 583–607; Sidgwick, "Elements of Politics," ch. 24; Story, "Commentaries," vol. II, ch. 38; Thayer, "Origin and History of the American Doctrine of the Right of the Courts to declare Acts of the Legislature Unconstitutional," "Harvard Law Review," vol. VII; Wilson, "Constitutional Government in the United States," ch. 6.

I. INDEPENDENCE OF THE JUDICIARY

It has been well observed by a noted jurist and commentator that "in every well-organized government — with reference to the security both of public rights and private rights — it is indispensable that there should be a judicial department to ascertain and decide rights, to punish crimes, to administer justice, and to protect the innocent from injury and usurpation." [1] Where there is no

[1] Rawle, "On the Constitution," ch. 21. Compare also the remarks of Justice Simon E. Baldwin, who observes that "no government can live and flourish without having as part of its system of administration of civil affairs some permanent human

judicial department to interpret and execute the law, to decide controversies, and to enforce rights, "the government must either perish," said Chancellor Kent, "by its own imbecility, or the other departments of government must usurp powers, for the purpose of commanding obedience, to the destruction of liberty." [1]

Independence of the Judiciary

It has been contended by some doctrinaires that, while in monarchical states the independence of the judiciary may be essential to protect the people from the arbitrary interference and oppression of the crown and also to prevent the judges from being reduced to a position of cringing subserviency to the executive, the same reasons do not apply in a republic.[2] But experience has abundantly shown that the independence of the judiciary is just as essential to protect the constitution and laws against the encroachments of party spirit and the tyranny of faction in a republic, as it is in a monarchy to protect the rights of the subject against the injustice of the crown.[3]

Upon no other branch of the government are the people so dependent for the enjoyment of personal security and the rights of property, and it is hardly necessary to add that the degree of protection thus afforded is conditioned in turn upon the wisdom, stability, and integrity of the courts.[4] To fulfill its high purpose the judiciary ought,

force, invested with acknowledged and supreme authority, and always in a position to exercise it promptly and efficiently, in case of need, on any proper call." "The American Judiciary," p. 3.

[1] "Commentaries," lect. XIV.

[2] Thomas Jefferson was a notable example of those holding this view. He was a strenuous advocate of short terms for all judges, federal and state alike, and suggested six years as the maximum term for the former. His opinions on this point, however, were probably affected by his well-known hostility to the federal judiciary. He discussed the judiciary in the spirit of a partisan, particularly after his controversy with Marshall.

[3] Cf. Kent, *op. cit.*, vol. I, p. 294.

[4] Cf. Story, "Commentaries," vol. II, sec. 1574. "Whatever," observed Edmund Burke, "is supreme in a state, it ought to have, as much as possible, its judicial authority so constituted as not only not to depend upon it, but in some sort to balance it. It ought to give security to its justice against its power. It ought to make its

therefore, to possess learning, faithfulness to the constitution, independence, and firmness of character. The existence of such qualities must depend largely upon the mode of appointment of the judges, the permanency of their tenure, the adequacy of the provision made for their support, and the extent and nature of the jurisdiction conferred upon them.

Appointment by the Legislature

First, as to the mode of appointment. The judiciary may be chosen by the legislature, by popular election, or by appointment of the executive, either with or without the concurrence of a council or one of the chambers of the legislature. Choice by the legislature has not commended itself generally to statesmen in the past because it renders the judiciary to a certain extent dependent upon a coördinate department of the government, in violation of the principle of the separation of powers. Furthermore, the system of legislative choice usually means nomination by a party caucus and often a parceling out of judicial positions among the political divisions of the state with reference to geographical considerations rather than fitness for the judicial office.[1] In short, as a great jurist has pointed out, it presents "too many occasions and too many temptations for intrigue, party prejudice, and local interest to secure a judiciary best calculated to promote the ends of justice."[2] Choice by the legislature was a favorite method of selection in the American states for a time after the Revolution, a circumstance due to the prevailing jealousy of the executive on the one hand and the distrust of popular election on the other. This system, however, has been abandoned in all the American states but four,[3] and is not followed in any Euro-

judicature, as it were, something exterior to the state." "Reflections on the French Revolution."

[1] Cf. Baldwin, "The American Judiciary," p. 312.

[2] Kent, "Commentaries," vol. I, p. 292.

[3] Rhode Island, Vermont, South Carolina, and Virginia. In Connecticut the legislature elects upon the nomination of the governor.

pean country except Switzerland, where the judges of the federal tribunal are chosen by the legislative assembly of the Confederation.

Popular Election of the Judges

The method of popular election is now the rule in the great majority of the states of the American federal union,[1] though outside of the United States it has made almost no headway. In Europe and in the English self-governing colonies it is unknown, except occasionally for the election of inferior magistrates, and even in the republics of Latin America, where democratic government has made great advance, popular election of the judges has found little acceptance.[2] The chief disadvantage of popular election is that it is apt to secure a judiciary at once weak and lacking in independence.[3] Where such a method prevails the election is usually made from candidates who have been nominated by party conventions or by primary elections following campaigns through the filth and mire of which the judicial ermine must often be dragged. The qualities which distinguish an able and fearless judge are not usually those of the successful politician; and hence judges frequently make poor candidates, and are sometimes defeated by men of less fitness, who are better gifted with the arts of winning public favor. Moreover, the masses of voters do not always possess the discrimination and understanding necessary to appreciate the soundness of judicial opinions, and hence the judge who renders a decision that does not meet the approval of public opinion, however sound it may be in law, can be reëlected only with difficulty if at all.[4] The judicial history of the American states, where

[1] Thirty-three in all.

[2] In Mexico the judges of the federal supreme court are, however, chosen by a process of indirect election.

[3] Cf. "The Federalist," No. 78.

[4] "The just and vigorous investigation and punishment of every species of fraud and violence and the exercise of the power of compelling every man to the punctual performance of his contracts," observed Chancellor Kent, "are grave duties not of the most popular character, and hence not always calculated to command the calm approval of the popular masses." "Commentaries," vol. I. p. 292 (12th ed.)

popularly elected judiciaries are most common, abounds in instances of the defeat of able and distinguished jurists because of unpopular judicial opinions rendered by them. Altogether it constitutes a chapter of history which is not creditable to American democracy and forms a strong indictment against the system of popular election.[1] Moreover, the necessity of submitting themselves and their legal opinions at frequent intervals to the judgment of the masses creates in the judges a strong temptation to shape their decisions and indeed their whole judicial conduct in such a way as to meet the approval of those to whom they must look for reëlection. No judge should be exposed to the necessity of having to curry popular favor in order to retain his office. As Chancellor Kent has well observed, the fittest men are likely to have "too much reservedness of manners and severity of morals to secure an election resting on universal suffrage."[2] It lowers the character of the judiciary, tends to make a politician of the judge, and subjects the judicial mind to a strain which it is not always able to resist.[3]

Executive Appointment

The experience of the past and the testimony of the majority of political writers concur in holding the method of executive appointment to be the best system yet devised for selecting the judiciary. The peculiar qualities adapted to the judicial station can be better discerned by a wise executive than by the masses of uninstructed voters, who, as has been said, are likely to be influenced by per-

[1] For some historical examples of the compulsory retirement of able and distinguished judges because of the unpopularity of their judicial opinions, see Baldwin, "American Judiciary," pp. 312–321.

[2] "Commentaries," vol. I, p. 292.

[3] See further on the popular election of judges, Esmein, "Droit constitutionnel," pp. 351 ff., and Mill, "Representative Government," pp. 253 ff. For a strong argument against a popularly elected judiciary see also Laveleye, "Le Gouvernement dans la Démocratie," vol. I, pp. 329–333. "*La plus mauvaise institution*," says Laveleye, "*qu'on recontre aujourd'hui dans la plupart des États-Unis, et peut-être la seule qui soit foncièrement mauvaise, est la magistrature élite. Les consequences n'en sont pas partout également regrettables. Mais elles sont parfois detestables.*

sonal qualities which are often lacking in great judges. Besides, the method of executive appointment removes the office, to a large extent, from the low level of party politics. destroys the temptation of the judges to popular subserviency, and thus adds to the independence and dignity of the judiciary. This method of selection has commended itself to the vast majority of countries outside of the United States, and even here it is the method in force for the appointment of all federal judges and of the higher judges of a number of the states.[1]

Tenure of the Judges

In regard to the tenure of the judges we find the same variety of opinion and practice. Most of the original thirteen states of America, in their first constitutions, established a good behavior tenure for their higher judges, and this rule was adopted by the national constitution for the federal judges. The substitution of short tenures, however, became a part of the democratic movement in the early nineteenth century, and in the course of time all the American states except three abandoned the good behavior principle for limited terms.[2] These terms range from two years, which is the rule in Vermont, to twenty-one years, which is the limit in Pennsylvania, the average being from six to nine years. In Europe, Switzerland is the only country in which the tenure of the higher justices is limited to a definite term, the period being six years for the members of the federal tribunal. In Latin America, Mexico is the only important republic in which the good behavior tenure is lacking, the term of the supreme judicature in that country being six years. Outside of the United States, therefore, the good behavior principle is practically universal. "The standard of good behavior for the continuance in office of the judicial magistracy,"

[1] For example, Massachusetts, Connecticut, Maine, New Hampshire, Delaware Mississippi, and New Jersey.

[2] The exceptions are Massachusetts, New Hampshire, and Rhode Island, where the judges are appointed for good behavior.

said Hamilton, "is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince; in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws." [1] It requires but little reflection to see, as Hamilton pointed out, that the judiciary from the very nature of its functions must necessarily be the least dangerous to the rights of the other departments, because it possesses the least capacity to annoy or injure them. "The executive," he remarked, "not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." [2] Finally, as Hamilton showed, a good behavior tenure is necessary to secure the experience and knowledge of judicial precedent which constitutes one of the most important sources of strength in the judicial office. In the course of a long judicial career marked by laborious study and constant application, the judge acquires a familiarity with the precedents which obviously cannot be gained by one whose tenure is limited to a brief period. Hence it is that "there can be but few men in the

[1] "The Federalist," No. 78.

[2] *Ibid.* Compare Montesquieu, who observed that "of the three powers the judiciary is in some measure next to nothing." "Esprit des Lois," bk. XI, ch. 6. Cf. also Story, "Commentaries," secs. 1600–1606.

society who will have sufficient skill in the laws to qualify them for the station of judges; and, making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge."

Removal of Judges

In all states, however, provision must be made for the removal of corrupt and inefficient magistrates; for the continuance in office, and especially for life, of an incapable or corrupt judge would be intolerable. The English judges in earlier times held their offices at the royal pleasure, but this proved to be a dangerous power to vest in the executive, because it made the judiciary subservient to the crown, especially in state trials, and gave the king a control over the administration of justice at once dangerous to private rights and subversive of the liberties of the people.[1] In the time of Lord Coke the barons of the exchequer were given a good behavior tenure; and during the reign of Charles II the same tenure was created for the common law judges, though the crown retained until after the revolution of 1688 the right to prescribe what tenure it might allow. Finally, by an act of Parliament passed in the thirteenth year of the reign of William III, the commissions of the judges were made to run during good behavior, and they were forbidden to be removed by the crown except upon an address of both houses of Parliament. In the course of time the same principle was adopted in many of the continental states of Europe.

In the United States the customary mode of removal is by impeachment, that is, through the preferment of charges by one chamber of the legislature, usually the lower, and trial by the other. The chief objection to this procedure is the danger that the legislature may employ its power of removal for party purposes, but this danger is largely eliminated by the provision that an extraordinary

[1] See on this point De Lolme, "Constitutional History of England," bk. II, ch. 16; Kent, vol. I, pp. 293–294; Story, vol. II, sec. 1608.

majority of the trial chamber shall be required to remove.[1] In the German Empire and certain other European states the possibility of this danger is eliminated by vesting the power of removal or suspension in the court of which the judge is a member, sitting as a disciplinary tribunal,[2] and then only after a regular trial for reasons expressly provided in the laws. In Italy the independence of the judiciary is weakened by the power of the executive to assign the judges to their stations. Thus a magistrate who refuses to show the desired subserviency to the executive may be "reassigned in the interest of the service" and sent to a less desirable judicial station in another part of the country. Frequent complaints have been made of the arbitrary exercise of this power.[3] Such a practice is prohibited in Germany by a constitutional provision to the effect that no judge may be transferred without his consent to another district except as a punishment inflicted

[1] Some of the American state constitutions which now provide or formerly provided for a good behavior tenure, fixed the attainment of a certain age as evidence of inability, and required all incumbents of the judicial office to retire upon reaching that age. Thus in New York, under an early constitution, the age limit was fixed at sixty, in consequence of which the state lost from its service Chancellor Kent, one of the greatest jurists that ever adorned the bench of any state — a man, says Story, who was at once the compeer of Hardwick and Mansfield. A similar requirement in England would have deprived the English bench of the services of Lord Mansfield for twenty years; and in the United States it would have compelled the retirement of Justices Marshall, Taney, Field, and many other of the great men who have sat on the federal supreme bench, at a time when they were still in the full possession of their strength. The value of such provisions, says Story (vol. II, sec. 1626), has never been satisfactorily established by any state. Speaking of the provision in the New York state constitution referred to above, Hamilton remarked: "I believe there are few at present who do not disapprove of this provision. . . . In a republic, where fortunes are not affluent, and pensions are not expedient, the dismission of men from stations in which they have served their country long and usefully, on which they depend for subsistence, and from which it will be too late to resort to any other occupation for a livelihood, ought to have some better apology to humanity, than is to be found in the imaginary danger of a superannuated bench." "The Federalist" (Dawson's ed.), p. 551.

[2] See two articles by the writer entitled, "The German Judiciary," in the "Political Science Quarterly," vols. 22 and 23.

[3] Cf. Lowell, "Government and Parties in Continental Europe," vol. I, p. 177.

by a disciplinary court, or in consequence of the reorganization of the judicial system, in which case the judge so transferred must be assigned to another station of equal rank and pay, and with an allowance sufficient to cover the cost of changing his residence.

Compensation of the Judges

Next to permanency of tenure nothing contributes more to the independence of the judiciary than a fixed and adequate provision for the support of the judges. In considering the necessity for such provision, Hamilton aptly remarked that "in the general course of human nature a power over a man's subsistence amounts to a power over his will."[1] "To give the judges the courage and the firmness to do their duty fearlessly," said Chancellor Kent, "they ought to be confident of the security of their salaries and station."[2] This is the opinion of practically all political writers of note, and it has become the practice of the great majority of states. In England, by a statute passed in the reign of George III, the full salaries of the judges were guaranteed during the continuance of their commissions; and this principle was introduced into the constitutions of a number of the American states. The constitution of the United States, in providing that the salaries of the federal judges should not be diminished during their time of office (without, however, forbidding their increase) was an improvement over all existing constitutional arrangements in this respect.

II. JUDICIAL ORGANIZATION

The Collegial Principle

The organization of the judiciary differs essentially from either that of the executive or the legislative departments.

[1] "The Federalist," No. 79.

[2] "Commentaries," vol. I, p. 294; Story, vol. II, secs. 1629–1633; Tucker's Blackstone, vol. I, App. 360. "The provision for the permanent support of the judges," continues Kent, "is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends also to secure a succession of learned men on the bench, who in consequence of a certain undiminished support,

The supreme executive power practically everywhere is vested in the hands of a single person, while the legislative power is intrusted to a more or less numerous assembly. The judicial power, on the other hand, is neither vested in a single person nor in an assembly, but in a number of magistrates, sometimes sitting singly and sometimes in bodies, constituting tribunals or benches, usually arranged in a hierarchical series one above the other. In some countries, of which the German Empire is a notable example, all the courts from the lowest to the highest are collegial in organization, that is, each is held by a bench of judges rather than by a single magistrate.[1] In other countries only the highest courts, usually those having appellate jurisdiction, are organized on the collegial principle. Thus in the judicial organization of the United States the district courts are held by a single judge, and the circuit courts may be, and frequently are, held by one judge. Among the individual states, generally, all the inferior courts are held by single judges, leaving only the highest courts to be constituted on the collegial principle.

Usually standing at the top of the hierarchy is a supreme court which has jurisdiction over cases brought up from the lower courts by way of appeal or upon writs of error, and whose decision is final and conclusive. This court may be a tribunal of review, that is, with power to revise the decisions of the lower courts; or it may be simply a court of cassation, with power only to "break" or quash the judgments of the lower courts; or it may be both. Sometimes instead of a single court of final authority there are several with equal and coördinate jurisdiction. This is the case, for example, in Italy, where there are five independ-

are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station."

[1] An exception to this statement is found in the organization of the German *Amtsgericht*, the lowest court in the judicial system, it being held by a single magistrate.

ent supreme courts of cassation, each having final and supreme authority within its own territorial jurisdiction. Between these courts the ordinary higher civil jurisdiction of the kingdom is divided; no appeal lies from one to another, and none of the five feels bound to accept the decisions of the others or follow them as precedents. This decentralization of the judicial system has proved to be a source of great weakness in the governmental system of Italy.[1] On the continent of Europe the division of the judicial tribunals into chambers or senates for convenience of administration is a common practice. Thus in the German Empire all the courts except the lowest (the *Amtsgericht*) are divided into civil and criminal chambers; and the imperial court (the *Reichsgericht*) is similarly divided into criminal and civil "senates," there being four of the former and six of the latter. Likewise, the highest court of France, the tribunal of cassation, is divided into sections, three in number. In order to avoid conflicting decisions where the court with final authority is divided into chambers or sections, sessions *in plenum* are sometimes necessary. In the United States the practice of dividing the courts into sections or chambers has rarely been followed.

Judicial Organization in Federal States

In states having the federal system of government there are usually two separate and distinct series of judicial bodies, one to exercise the national or general jurisdiction of the whole union, the other the local jurisdiction of the component states.

In Germany

This is not necessarily so, however, as the organization of the German judicial system clearly shows. Instead of two separate and distinct systems, one to exercise the judicial power of the empire and the other that of each individual state, there is a single uniform system for the empire and the states alike, all being organized under imperial law and exercising their functions

[1] Lowell, "Government and Parties in Continental Europe," vol. I, p. 170.

in accordance with an imperial code of procedure. Thus the entire judicial system of the country, from the bottom to the top, rests upon the same basis; the competency and procedure of all the courts are determined by imperial law, and they are held by judges whose qualifications and tenure are prescribed by the same authority. There is no division of jurisdiction between the empire and the states; in short, the federal principle has no place in the judicial organization of that country. Nevertheless, with the exception of the *Reichsgericht*, the courts are all regarded as state tribunals rather than as imperial courts, the judges being appointed by the state governments and their compensation being determined and provided by the same authorities. Moreover, they exercise their jurisdiction in the name of the local governments and are subject to the oversight of the states in which they are situated. As there is one uniform judicial organization for all the German states, so there are common imperial codes of civil and criminal law and of procedure. Thus neither diversity in judicial organization nor of law exists in Germany, though the state is federal in its organization.

In the United States

In the United States, on the contrary, there are as many systems of judicial organization and of law and procedure as there are states. Each individual commonwealth organizes its own judiciary and frames its own codes of law and procedure, according to its own notions and its own conception of its local needs and conditions. Nevertheless, there is in reality far more of resemblance than of diversity, owing to the common basis which is afforded by the common law, upon which the legal system of each of the states rests. There are, of course, variations, but in essentials there is remarkable similarity and uniformity. Only in a limited sense are the courts of one state regarded by those of another as foreign. The constitution of the United States requires that the courts of each state shall give full faith and credit to the records and judicial pro-

ceedings of the other states; and the spirit of judicial comity — the deference paid by the courts of one state to the decisions of the others — which characterizes interstate judicial relations constitutes a powerful unifying force. This rule of comity, together with the full faith and credit provision, makes possible the enforcement in one state of rights acquired in others and likewise contributes to the prevention by one of acts which would infringe on prohibitions created by others.[1]

Relation between the Courts of the United States and those of the States

Moreover, there are many points of connection between the national and state judiciaries. Thus every judicial officer of a state is required by the constitution of the United States to bind himself by oath to support its provisions and this obligation makes it incumbent upon him in his judicial capacity to respect the laws and treaties of the United States and in case of conflict between them and the laws of the state which he is commissioned to enforce, to uphold and give precedence to the former. Both the national and state courts are in a sense complementary parts of the same governmental system. Rights arising under the national constitution and laws may ordinarily be enforced by the state courts, though the federal government cannot compel them against their will to exercise the jurisdiction and discharge the duties which properly belong to the national courts. There are many cases which can be brought at the option of the plaintiff in either a federal or a state court, but in most instances if brought in the latter the defendant has the right of removing it to a federal court if he chooses.[2] Furthermore, in any case tried in a state court, if the decision turns on a claim of

[1] Cf. Baldwin, "The American Judiciary," p. 182.

[2] "Such is the state of the law at this time," says Judge Cooley, "that many cases within the reach of the judicial power of the United States are left wholly to the state courts, while in many others the state courts are permitted to exercise a jurisdiction concurrent with that of the federal courts, but with a final review of their judgments on questions of federal law in the United States Supreme Court." "Principles of Constitutional Law," p. 124.

right arising under the constitution or laws of the United States and if the decision is adverse to the claim, the losing party may appeal therefrom and have the decision of the state court reviewed by the highest federal court in the land.[1] This is necessary, otherwise the constitution and laws of the United States would not be what they are declared to be, namely, the supreme law of the land.

III. ADMINISTRATIVE COURTS AND ADMINISTRATIVE JURISDICTION

Administrative Controversies

On the continent of Europe, particularly in France and Prussia, a special class of tribunals, separate and distinct from the ordinary courts of justice and constituted on different principles, has been provided, for the determination of administrative controversies, that is, disputes between private individuals and the public authorities as well as disputes among administrative officials themselves.[2] In general, where such a system prevails, so-called administrative controversies are not allowed to be determined by the regular judicial courts. The idea originated in France at the time of the Revolution, and may be said to have resulted from the extreme conception of the doctrine of the separation of powers, then held by the French. Montesquieu's famous theory concerning

[1] "The legislation of Congress," observes Judge Cooley, "has left the parties at liberty, with few exceptions, to bring their suits in the state courts, irrespective of the questions involved, but has made provision for protecting the federal authority by a transfer to the federal courts, either before or after judgment, of the cases to which the federal judicial power extends." "Principles of Constitutional Law," p. 125. On the relation of the state to the federal courts, see also Baldwin, "The American Judiciary," ch. 10.

[2] On the nature of the administrative jurisdiction see St. Girons, "La Séparation des Pouvoirs," bk. II, ch. 3; Goodnow, "Comparative Administrative Law," vol. II, pp. 190–198; Ashley, "Central and Local Government," ch. 8; Berthélemy, "Traité élémentaire de Droit administratif," bk. III, ch. 1; Aucoc, "Droit administratif," vol. I, bk. III, ch. 1; Pradier-Fodéré, "Précis de Droit administratif," pt. III, ch. 1; and Meyer, "Deutsches Verwaltungsrecht," pt. I, sect. 9.

the necessity of intrusting the legislative, executive, and judicial powers to separate and distinct organs was embodied in extreme form in the "declaration of rights of man and the citizen" of 1791 by the Constituent Assembly, which asserted that it the judiciary were permitted to meddle with administrative officials in the discharge of their duties the constitution would be violated and the operations of the government hindered.[1] The administrative authorities were therefore made completely independent of judicial control, and the judges were interdicted under pain of forfeiting their offices from interfering in any manner with the acts of the administration.[2] This principle was in turn introduced into other continental states, particularly into Prussia and Italy, and has been retained by them to the present day.

Argument in Favor of Administrative Courts

The chief advantage claimed for the system is that the subjection of the public authorities to the continual control and interference of the judicial courts is detrimental to prompt and efficient administration. Administrative controversies are somewhat peculiar in their nature and involve questions which for proper consideration require a special and technical knowledge not ordinarily possessed by judges whose training and experience have been confined to the field of private law, and whose education has been academic rather than practical. Such judges are likely to have exaggerated notions of the rights of private individuals, as against those of the public; they are inclined to a natural timidity in deciding issues between individuals and the government adversely to the claims of the individual; and with their disposition to adhere strictly to legal rules and traditions they sometimes unnecessarily

[1] Art XVI.

[2] "There has always existed," says a French writer, "a school of French publicists who have objected to referring administrative matters to bodies which have anything whatever of a judicial character and who have maintained that where the rights of the state are concerned the administration as representing the state should be the sole judge in its own cause." Vivien, "Études administratives," vol. I. p. 120.

hamper and obstruct the legitimate operations of the government.[1]

The history of administration in the United States and England abounds in illustrations of the truth of these observations. Only men who have been trained in the study of administrative law and who have had practical experience in the actual work of public administration, it is said, are capable of deciding wisely controversies involving a technical knowledge of administrative questions. Judges without such special knowledge or experience are apt to apply to the interpretation of controversies between private individuals and the public authorities the pure principles of private law, rather than those of the public law. This sometimes leads to results that are wholly inconsistent with sound public policy and efficient administration, for the rules of law governing the organization and functions of the administration are quite different from those governing the relations of private individuals, since the purpose of the former is the public welfare rather than private interests. When the government is a party to a dispute it cannot be treated like a private litigant without seriously injuring at times its efficiency and impeding its operations. The law of contract and tort, for example, which plays so important a part in the regulation of the conduct of private individuals occupies a very unimportant place in the law governing the relations of the public authorities. The administration of two such widely different bodies of rules requires, therefore, different habits of mind, traditions, and training.[2] It is also to be remarked that the individual under the con-

[1] Compare Lowell, "Government of England," vol. II, p. 502.

[2] Cf. Goodnow, *op. cit.*, vol. I, p. 13; Burgess, "Political Science and Constitutional Law," vol. I, p. 238, where it is shown that the result of the rigid application by the United States Supreme Court of the law of contract in public relations has been to introduce into the constitutional law of the United States feudal principles; Aucoc, *op. cit.*, vol. I, bk. III, ch. 1; Berthélemy, *op. cit.*, bk. III, ch. 1, sec. 1; and Meyer, *op. cit.*, pt. I, p. 36.

tinental system can often obtain redress where he could not do so in America or England, as, for example, in a case of neglect or abuse of power by an official who would not in America or England be liable in damages.[1]

Objections to Administrative Courts

The chief objection that has been urged against the European method of relieving the public authorities from the control of the regular courts of justice and intrusting the determination of so-called administrative controversies to special tribunals, is that it destroys to a large extent the legal protection of the individual against the acts of the administrative authorities.[2] The legal remedies which are allowed by these courts for the infringement of individual rights by the authorities are quite different from, and, it is asserted, less effective than, those afforded by the regular judicial courts in other cases.[3] Moreover, their responsibility is to a class of tribunals made up largely of administrative officials who, being a part of the government themselves, are apt to be less favorable to individual rights than are judges of the regular judicial courts. This may be due partly to their natural zeal for the rights of the administration, or the result of pressure on the part of the government itself.[4] The possibility of this danger is especially great in France, where the administrative judges do not enjoy the same independence as the other judges, but hold their commissions at the pleasure of the adminis-

[1] Compare Lowell, "Government of England," vol. II, p. 501.

[2] "If we take France as the type of a continental state," says Dicey, "we may assert with substantial accuracy that officials are in their official capacity protected from the ordinary law of the land, exempted from the jurisdiction of the ordinary tribunals, and subject in many respects only to official law administered by official bodies." "Law of the Constitution," p. 181.

[3] Compare on this point Percy Ashley's "Central and Local Government," p. 296; and Dicey, "Law of the Constitution," lect. V.

[4] See De Tocqueville, "Democracy in America," vol. I, pp. 107–108, for an account of the protection which the French law threw around the public officials for their acts at the time he wrote. On the organization, powers, and procedure of the French administrative tribunals, see Berthélemy, *op. cit.*, bk. III, chs. 2–4; on that of the German administrative courts, see Meyer, *op. cit.*, secs. 10–17, and Lening, "Deutsches Staatsrecht" secs. 204–212.

tration and hence are subject to its control and dictation.[1] They are so much a part of the administration, observes an American writer, that they fall into the department of the interior rather than that of justice and may be "controlled absolutely in case of necessity." In France, therefore, continues the same writer, there is one law for the citizen and another for the public official, and thus the executive is really independent of the judiciary, for the government has always a free hand, and can violate the law if it wants to do so without having anything to fear from the ordinary courts.[2] Theoretically this rather harsh judgment has some justification, but in practice the French administrative courts have not shown any such extraordi-

[1] Speaking of the French administrative tribunals, Dicey remarks that "all of them from the council of the prefecture up to the council of state bear the more or less definite impress of an official or governmental character; they are composed of official persons, and, as is implied by the very pleas advanced in defence of withdrawing questions of administrative law from the civil courts, look upon the disputes brought before them from a governmental point of view, and decide them in a spirit different from the feeling which influences the ordinary judges." The system of administrative courts is defended by the French, he contends, because in their opinion it is only from such tribunals that the interests of the state will receive due consideration. "Official courts are in short supported because they have an official bias." "Law of the Constitution," 2d ed., pp. 191–192.

A more moderate and, on the whole, a fairer estimate of the value of administrative courts is that of Professor Sidgwick, who holds that while there are certain disputes, such as pecuniary claims of individuals against the state, which do not need to be withdrawn from the jurisdiction of the ordinary courts, the case is somewhat different in respect to claims for damages on account of injuries committed by administrative officials in alleged violation of the laws but acting in their official capacity. In the latter class of controversies Sidgwick is inclined to think that a more just decision will be reached by a court composed partly of persons who have had official experience in such matters, though perhaps they ought not at the same time to be an actual part of the executive branch. Examples of such cases are where an individual is arrested under suspicion without a warrant, or a ship is detained as unseaworthy or a public meeting is broken up by an official. "Elements of Politics," pp. 505–507.

[2] Lowell, "Government and Parties in Continental Europe," vol. I, p. 58. Mr. Lowell in his more recent work on the "Government of England," vol. II, p. 503, apparently takes a more favorable view of the French administrative courts, and he calls attention to a number of noted cases in which decisions have been rendered against the government and in favor of the claims of private individuals.

nary subservience to the government and but little disposition to trample upon individual rights in the alleged interest of public expediency. Indeed, it is the opinion of a careful student of French public law that the administrative courts have in fact shown themselves more favorable to private rights than have the regular courts of justice.[1]

Conflict Courts

Whatever may be the facts as to the adequacy of the remedies which are afforded by the administrative courts for the protection of private rights, there can be no doubt that, from the point of view of administrative efficiency, administrative control has decided advantages over judicial control. This is admitted by the severest critics of the system.[2]

Where there are two sets of tribunals and two separate bodies of law, disputes must sometimes arise as to which domain a particular controversy belongs to and which tribunal should have jurisdiction of it. For the determination of such disputes of jurisdiction the French law provides for a tribunal of conflicts, while in Germany there is usually a similar tribunal known as a competence-conflict court. In both countries these courts are composed of a certain number of regular judges and of persons in the administrative service. In the German imperial system, however, all conflicts of jurisdiction between the imperial administrative courts and the judicial courts are settled by the latter, there being no special conflict courts. In both countries the power of raising the question of a conflict of jurisdiction belongs to the administration only,

[1] Goodnow, *op. cit.*, vol. II, pp. 221, 230.

[2] See Lowell, "Government and Parties," vol. I, p. 60. For additional information on the subject of administrative courts, see Batbie, "Traité de Droit public et administratif"; Aucoc, "Conferences sur l'Administration," also his "Cours de Droit administratif"; Ashley, "Local and Central Government," ch. 8; Laferrière, "Traité de Droit administratif," bk. III, ch. 6; Pradier-Fodéré, "Précis de Droit administratif"; Ducroq, "Cours de Droit administratif"; St. Girons, "La Séparation des Pouvoirs," pp. 472 ff.; De Grais, "Handbuch der Verfassung und Verwaltung"; Meyer, "Deutsches Verwaltungsrecht"; and Grotefend, "Das innere Verwaltungsrecht."

the theory being that it alone can be interested. When the administration notifies the judicial court that in taking jurisdiction over a particular controversy, it is encroaching upon the sphere of the administration, the court suspends further proceedings, and the question of competence is referred to the tribunal of conflicts for determination.[1] If the decision is in favor of the claim set up by the administration, the case is removed to the administrative courts for final decision, otherwise it is decided by the judicial court.[2]

English and American Ideas

In England and America, and in countries generally where English legal institutions have been introduced, the doctrine of administrative jurisdiction, as it is known and practiced on the continent of Europe, is little known. There administrative law is not a separate branch of jurisprudence, and specially constituted administrative courts with jurisdiction over controversies between private individuals and public officials do not exist, at least not in the form in which they are found on the continent. Disputes between the public authorities and private citizens, like differences between private individuals themselves, are decided by the regular judicial courts and according to the ordinary

[1] Goodnow, vol. II, bk. VI, ch. 8; St. Girons, "La Séparation des Pouvoirs," pp. 528 ff., and Meyer, *op. cit.*, secs. 12–15.

[2] Dicey, speaking on this point, remarks that the "true nature of administrative law therefore depends in France upon the constitution of the *tribunal des conflits*." "Constituted as it is of an equal number of administrative officials and judges of the regular courts, it follows that the jurisdiction of the civil tribunals is, in all matters which concern officials, determined by persons who, if not actually part of the executive, are swayed by official sympathies, and who are inclined to consider the interest of the state or of the government more important than strict regard to the legal rights of individuals." "Law of the Constitution," p. 194. Compare also De Tocqueville, "Democracy in America," vol. I, pp. 107–108.

In a recent edition of his "Law of the Constitution," Dicey has restated his views on the *droit administratif* and has expressed a more favorable opinion of the system. He frankly admits that his earlier views, which were derived mainly from the writings of De Tocqueville, exaggerated the arbitrary character of the administrative tribunals, and that he had failed to perceive the great change which the administrative law had undergone since De Tocqueville wrote.

law of the land. The private citizen who is injured by the action of the public authorities has exactly the same remedies that he would have if the injury had been committed by another private individual, and his recourse is in the same courts.[1] In short, there is one law and one court for the citizen and the public functionary alike. Public officials enjoy no special privileges or immunities and are not exempt from responsibility for their wrongful acts, but must answer equally with private individuals to the regular courts of justice. "In England," observes Dicey, "the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the prime minister down to a constable or a collector of taxes, is under the same responsibility as any other citizen for every act done without legal justification. The reports abound with cases in which officials have been brought before the courts and made in their personal capacity liable to punishment or to the payment of damages for acts done in their official capacity." [2] "Every act of public authority, no matter by whom or against whom it is directed, is liable to be called in question before an ordinary tribunal, and there is no other means by which its legality can be questioned or established." [3]

Administrative Boards and Commissions

Nevertheless, both in England and America, there are numerous boards, commissions, and authorities which possess what may not improperly be described as administrative jurisdiction. They are, in fact, often referred to as administrative tribunals; they possess the power of adju-

[1] Cf. Ashley, "Central and Local Government," pp. 12, 289, 306.

[2] "Law of the Constitution," p. 180. Again he says, "The notion which lies at the bottom of the administrative law known to foreign countries that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies is utterly inconsistent with our traditions and customs." *Op. cit.*, p. 218.

[3] Redlich and Hirst, "Local Government in England," vol. II, p. 365.

dication and determination in many cases, and not infrequently their decisions are conclusive, and hence not subject to review by the courts.[1] Although they are not a part of the judicial system, their procedure when hearing and determining controversies is often characterized by the formalism of the courts of justice. A regular system of appeal is often allowed from one to another, and in some cases their decisions are published and cited as precedents.[2] In England examples of authorities which exercise a limited administrative jurisdiction are the Railway Commission, the Local Government Board, the Board of Trade, the Board of Education, and the Board of Agriculture.[3] In the United States similar bodies are the Interstate Commerce Commission, whose powers have been described as "quasi administrative, quasi judicial"; the Pension Office, the Patent Office, the Land Office, the Bureau of Immigration, the office of Comptroller of the Treasury, the General Board of Customs Appraisers, the United States Customs Court, and the Court of Claims.[4] In the state governments there are almost countless boards and commissions which possess similar powers. Among these may be mentioned railroad commissions, boards of health, departments of education, pure food commissions, etc. There is, in fact, scarcely any department of the administrative service in which controversies involving both public and private rights do not frequently arise, which can be more wisely determined by the administration itself than by a court of justice. This fact has been recently

[1] As to the latter point, see Powell, "Conclusiveness of Administrative Determinations in the Federal Government," "American Political Science Review," vol. I, pp. 583–607.

[2] See Bowman, "American Administrative Tribunals," "Political Science Quarterly," vol. XXI, pp. 607–625.

[3] Compare Ashley, "Central and Local Government," pp. 16–22.

[4] See Fairlie, "National Administration of the United States," where the administrative and judicial aspects of the above-mentioned authorities are discussed in their appropriate places.

recognized by the Congress of the United States in the act creating a customs court vested with power to determine controversies between the government and importers, regarding the value and classification of imported articles upon which a customs tariff is imposed.

Whatever, therefore, may be said against the European system of administrative justice and of administrative law, with its somewhat exaggerated emphasis upon the rights of the government in contradistinction to those of private individuals, the fact remains that it exists in England and America, though in less developed form; and the rôle which it is destined to play in the future is bound to increase with the multiplication of governmental functions and the increasing complexity of the governmental organization.

IV. POWER OF THE JUDICIARY OVER THE ACTS OF THE LEGISLATURE

Necessity of Interpretation

In every state there must be some authority empowered to declare what the law is when its meaning in a particular controversy is drawn in question. Thought is subtler than expression, and owing to the deficiencies and ambiguities of language it is difficult to reduce rules of conduct to written form so as to convey exactly the same meaning to different minds. The meaning of the written law, therefore, is frequently a matter of dispute; and when parliamentary draughtsmen are careless or incompetent and the law must be applied under conditions and circumstances which could never have been contemplated by even the most imaginative legislator, the possibility of disputes is greatly increased.[1] In such circumstances the courts are accustomed not only to assume the right of discovering the hidden meaning of the law but, if possible, of giving effect to the presumable intention of the lawmaker, even if this

[1] Compare Baldwin, "The American Judiciary," p. 81; Cooley, "Constitutional Limitations," 7th ed., p. 70; and Lieber, "Legal and Political Hermeneutics," p. 13.

does involve a subordinate power of law making and is in conflict with the theory of the separation of powers. Even in France, where the doctrine of the separation of powers has been most emphasized, the Civil Code declares that the judge who shall refuse to decide a case on the pretext that the law is silent or obscure or insufficient may be prosecuted for denial of justice. English and American judges, however, have always maintained that in such cases they do not "make" the law but only "find" it, between the lines, as it were.[1] From the very nature of the case this function cannot be discharged by the legislature in the numerous individual cases in which the applicability of the law is involved.[2] Nor can the power be safely intrusted to the executive, whose function must be limited to the enforcement of that which the legislature has enacted and the courts have interpreted. But this is not intended to imply that the legislature cannot by declaratory acts determine what the

[1] See an article by Professor Munroe Smith, entitled "Judge-made Constitutional Law," in "Van Norden's Magazine" for 1907, p. 25. "Modern courts may and habitually do," says the German jurist, Windscheid, "think over again the thought which the legislator was trying to express," while the Roman jurists went even farther, and undertook "to think out the thought which the legislator was trying to think," that is, what he would have intended had he known what future conditions would be.

[2] The constitutions of some of the American states, notably those of Maine, New Hampshire, Massachusetts, and Colorado, make it the duty of the supreme court when called upon by the legislature or the executive to give its opinion in advance "upon important questions of law and upon solemn occasions." By this means the legislature may ascertain beforehand the opinion of the court upon the validity of a proposed statute in order that it may abstain from enacting the law in case it is deemed to be unconstitutional. But in such cases the court acts *ex parte*, as it were, and without the benefit of argument at the bar, and hence its opinion is not necessarily conclusive. In cases where an adverse opinion is given in this manner and the legislature passes the act notwithstanding the opinion of the court, and its validity is contested, the court may upon full hearing and in the light of the information brought out by the argument render a contrary opinion. The Supreme Court of the United States, however, is not required to give the Congress or the President opinions in advance, and it has uniformly declined to do so when requested by either authority. See on these points Cooley, "Constitutional Limitations," pp. 72–73.

meaning of the statute shall be, provided the acts are general in character and prospective in operation.[1] As to their operation in the past, the meaning is for the courts alone to determine. This does not mean that the executive cannot put its own interpretation upon the statute and proceed to enforce it as thus understood until its meaning has been authoritatively declared by the judiciary. In both cases the right of the legislature and the executive is acknowledged to exist and indeed is essential to the independence of each department and to the practical operation of the government itself.

Judge-made Law

In all systems of law known to history the courts by interpretation and construction have worked out an extensive system of jurisprudence popularly described as "judge-made" law. Thus the Roman jurists developed an immense body of private law from the meager fabric of the Twelve Tables, and the English and American judges have done likewise from the body of written law, statutory and constitutional. This must necessarily happen in any legal system which grows and expands to meet the changing necessities of society. "Human affairs being what they are," remarks an eminent publicist, "there must be a loophole for expansion or extension in some part of every scheme of government; and if the constitution is rigid, flexibility must be supplied from the minds of the judges."[2] Of all authorities in the state the judiciary is best adapted by the training, habits, and traditions of its members to perform this high and delicate function.[3]

Power of the Courts to annul Acts of the Legislature

Whether the judiciary in the exercise of its undoubted right of interpretation, that is, of discovering the meaning of the written statute which it is called on to apply, may, if

[1] See Cooley, "Constitutional Limitations," ch. 6, for a full discussion of this subject.

[2] Bryce, "Studies in History and Jurisprudence," vol. I, p. 197.

[3] On the general subject of judicial interpretation, see Baldwin, "The American Judiciary," ch. 6; Cooley, "Constitutional Limitations," ch. 4; and Lieber, "Legal and Political Hermeneutics."

in its opinion the statute is inconsistent with some superior law, refuse to apply such a statute and treat it as null and void, is a question which has been much mooted by jurists and political writers. Outside the United States the practice and, to a large extent, the opinions of commentators have been adverse to the assumption of such a power on the part of the courts. On the continent of Europe the general principle prevails that the lawmaking body itself is the only judge of the validity of its acts.[1]

German Practice

In the German Empire the *Reichsgericht* claims and has exercised the power of pronouncing the legislative acts of the component states of no force when they are repugnant to the imperial constitution or laws.[2] But it has never assumed to declare an imperial statute null and void because of its real or supposed inconsistency with the imperial constitution.[3] In Germany and other states on the continent where this rule prevails, the courts must therefore enforce without question the declared will of the legislature, whether it be contrary to the will of the state as embodied in the constitution or not. It is not their right to assume that the legislature, intentionally or unwittingly, has exceeded its powers; nor their prerogative to set aside as invalid what has been enacted, pre-

[1] "In Europe," says Esmein ("Droit constitutionnel," p. 431), "and especially under the régime of imperative and written constitutions, the idea is well established that the tribunals have no right to pass upon the constitutionality of the laws. When regularly enacted they are binding upon the courts, and they have only the right to apply them, not to judge of their validity."

[2] See, for example, a decision of the German Imperial Court in 1887, holding an income tax law of Prussia void because of its repugnance to a provision of the imperial constitution. "Entscheidungen in Civilsachen," vol. XIX, p. 176. See also Laband, "Staatsrecht des deutschen Reiches," vol. II, p. 576.

[3] For a discussion of this question so far as it relates to the German system, see an article by the writer entitled "The German Judiciary," in the "Political Science Quarterly," vol. XVIII, especially pp. 524–530, where citations of the literature bearing on the question may be found; see also Coxe, "Judicial Power and Unconstitutional Legislation," pt. I, ch. 9, and Von Mohl, "Über die rechtliche Bedeutung verfassungswidriger Gesetze" in his "Staatsrecht, Völkerrecht und Politik," vol. I, pp. 65–95.

sumably after careful deliberation and with full knowledge of its own constitutional powers.[1]

French Practice

In France it does not appear that the judiciary has ever claimed or exercised the power of setting aside legislation repugnant to the "*lois constitutionnelles*" of the republic. "Any one, in fact," says Dicey, "who bears in mind the respect paid in France from the time of the Revolution onwards to the legislation of *de facto* governments and the traditions of the French judicature will assume with confidence that an enactment passed through the Chambers, promulgated by the President, and published in the *Bulletin des Lois* will be held valid by every tribunal throughout the republic." [2] Consequently the restrictions placed upon the power of the legislature by the constitution are not really laws, since the courts will not in the last analysis enforce them, but they are mere "maxims of political morality, which derive whatever strength they possess from being formally inscribed in the constitution and from the resulting support of public opinion." [3]

[1] The constitutions of the three small Swiss cantons of Uri, Schweiz, and Unterwalden allow the courts to set aside laws which are in conflict with the constitution. The constitution of the Confederation, however, makes it mandatory upon the federal tribunal to give force and effect to every law enacted by the federal assembly (art. 113). For the reasons why Switzerland refuses to follow the American practice, see Cunningham's "The Swiss Confederation," p. 295. See also Rüttiman, "Das nordamerikanische Bundesstaatsrecht, verglichen mit den politischen Einrichtungen der Schweiz," sec. 290. The question was discussed in the Transvaal just prior to the Boer war (Bryce, "Studies in History and Jurisprudence," vol. I, p. 378). In his next inaugural address, says Lowell ("Government of England," vol. I, p. 7), President Kruger quoted Scripture to prove that the principle of holding statutes unconstitutional was an invention of the devil.

[2] "Law of the Constitution," p. 122 (2d ed.).

[3] The doctrine that the legislature is the judge of the validity of its own acts was proclaimed by the Constituent Assembly in 1790, when it declared that "the tribunals shall not participate directly nor indirectly in the exercise of the legislative power, nor interfere with or suspend the execution of the decrees of the legislative body sanctioned by the king under pain of forfeiture of their offices." This principle, says Esmein ("Droit constitutionnel," p. 437), is strictly followed in France to-day. Nevertheless the American doctrine had able adherents in France at the time of the Revolution, and several of them, notably Dupont de Nemours, Robespierre, and

British Practice

In Great Britain, where the legal omnipotence of Parliament is a recognized principle and where there is no legal distinction between laws which are fundamental or constitutional and laws which are not, the courts, of course, have no power to judge of the validity of an act of Parliament. Whatever it enacts is binding upon every person and every authority and must be enforced by the courts, though it may clearly overrule the principles of the common law and the ancient customs of the realm.[1] In the British self-governing colonies, notably Canada and Australia, the American doctrine has gained a foothold; and acts passed by the local legislatures which are inconsistent with acts of the British Parliament establishing the colonial government, or with acts passed by the Dominion or Commonwealth parliaments, are held by the courts to be null and void.[2]

Early American Practice

In the United States the doctrine of the right of the judiciary to set aside and refuse to be bound by legislative acts which in its opinion contravene the supreme law has been acted upon from colonial times and has been a familiar

Sieyès, proposed to insert in the declaration of rights a provision affirming the nullity of all laws inconsistent with the constitution. For an account of these various proposals, see Esmein, *op. cit.*, pp. 435–436. Note especially Sieyès's proposed *jurie constitutionnaire*, which was to be a body of representatives empowered to decide upon the validity of acts alleged to be in conflict with the constitution. On March 16, 1894, M. Naquet, in the French Chamber of Deputies, made a spirited defence of the American doctrine and pleaded for its introduction into France. The French practice also prevails in Belgium (see Thomissen, "Le Constitution Belge," 2d ed., p. 33) and in Italy (see Palma, "Corso di Diritto constituzionale," vol. II, p. 546.

[1] This, however, was questioned by Coke, who asserted that an act of Parliament "against common right and reason could be adjuged void at common law" (8 Coke 114), and is denied by Hearn ("Government of England," pp. 37–40). On the whole question see Dicey's "Law of the Constitution," especially lect. II, on "The Sovereignty of Parliament."

[2] See Munro, "The Constitution of Canada," pp. 5, 219; Moore, "The Commonwealth of Australia," ch. 10, especially pp. 173–177; and Lowell, "Government of England," vol. I, p. 7. Article 109 of the Australian Commonwealth Act expressly declares that "when a law of a state is inconsistent with a law of the commonwealth, the latter shall prevail and the former shall to the extent of the inconsistency be invalid."

one in American jurisprudence.[1] As early as 1780 the highest court of New Jersey laid down the doctrine and acted upon it in refusing to enforce an act of the state legislature.[2] Six years later the principle was announced and followed by the highest court of Rhode Island in a noted case,[3] and shortly thereafter by the courts of North Carolina and Virginia. Neither the federal constitution nor any of the state constitutions have expressly recognized or sanctioned the principle; yet it has always been considered a part of state and federal jurisprudence, and both the state and federal courts have without exception acted in accordance therewith, and their action has received the general acquiescence of the people.[4] Indeed, as Dicey observes, it is considered not only the right, but the duty, of every judge in the United States to treat as void any enactment which violates the constitution.[5] It was asserted to

[1] In a number of the Latin American states, where the constitution of the United States has been largely imitated, the right and duty of the courts to declare acts of the legislature null and void when they are repugnant to the constitution is generally recognized. See constitution of Mexico, art. 101; constitution of Argentina, arts. 100, 101; constitution of Brazil, art. 59, sec. 1, and art. 60; see also Esmein, "Droit constitutionnel," p. 430; Dairaux, "République Argentine," p. 45.

[2] Holmes *v.* Walton. For a history of this somewhat celebrated case, see "The American Historical Review," vol. IV, pp. 456, etc.

[3] Trevett *v.* Weeden. For a history of this case, see Arnold's "History of Rhode Island," vol. II, ch. 24; also Coxe, "Judicial Power and Unconstitutional Legislation," pp. 234 ff., and Kent, "Commentaries," 12th ed., pp. 450–453.

[4] To find the causes of this idea, says Burgess, "we must go back of statutes and constitutions for the explanation. . . . It is the consciousness of the American people that law must rest upon reason and justice, that the constitution is a more ultimate formulation of the fundamental principles of justice and reason than mere legislative acts, and that the judiciary is a better interpreter of those fundamental principles than the legislature. This consciousness has been awakened and developed by the fact that the political education of the people has been directed by the jurists rather than by the warriors and the priests; and it is the reflex influence of this education that upholds and sustains, in the United States, the aristocracy of the robe." "Political Science and Constitutional Law," vol. II, p. 365.

[5] "Law of the Constitution," p. 125. Compare also Cooley ("Constitutional Limitations," p. 228), who observes that "it is now generally agreed that the courts cannot properly decline to overrule the acts of legislature when it has exceeded the authority set by the constitution to its limits."

be a right and duty by a federal judge for the first time in 1795, when, in charging a jury, he said: "I take it to be a clear position that if a legislative act oppugns a constitutional principle, the former must give way and be rejected on the score of repugnance. I hold it to be a position equally clear and sound that in such a case it will be the duty of the court to adhere to the constitution and to declare the act null and void." [1] In 1803 the United States Supreme Court, in the celebrated case of Marbury *v.* Madison,[2] first acted upon the principle by holding an act of Congress to be inoperative on account of its repugnance to a provision of the federal constitution. Since then the Supreme Court has set aside not less than twenty-one acts of Congress and over two hundred state statutes.[3] How many acts of the state legislatures have been pronounced unconstitutional by the courts of the states is not known, but the number probably reaches into the thousands.[4]

Hamilton's Views

Although, as has been said, the federal constitution contains no provision which could be construed as conferring upon the courts such power over the acts of the legislature, it was understood by the statesmen of 1787–1789 as being an inherent part of the judicial power and needed no express authority for its exercise. Hamilton, in 1788, in advocating the ratification of the constitution, asserted that the courts undoubtedly possessed the power to pronounce legislative acts void when contrary to the constitution, and he supported the right by a line of argument which has never been surpassed by its clear, convincing, and logical statement. Addressing himself to the contention which had been advanced that

[1] Mr. Justice Patterson, in the case of Vanhorne's Lessee *v.* Dorrance, 2 Dallas Reports 304.

[2] 1 Cranch 137. [3] Baldwin, "The American Judiciary," p. 106.

[4] An examination of the New York State Library Bulletin of Comparative Legislation shows that from fifty to seventy-five state statutes are now being set aside annually by the supreme courts of the states on the ground of repugnance to the state or federal constitutions.

the exercise of such a power involved the superiority of the judiciary over the legislative power, he declared: "There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor or commission under which it is exercised, is void. No legislative act, therefore, contrary to the constitution, can be valid. To deny this, would be to affirm that the deputy is greater than the principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that mere men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid."[1] He pointed out that it could not have been presumed that the constitution which specified the powers conferred upon the legislature intended in the same breath to make the legislature the judge of its own powers and to establish the principle that the construction placed by it upon the extent of those powers was to be conclusive upon the other departments. "A constitution is in fact and must be regarded," Hamilton went on to say, "as a fundamental law." It therefore belongs to the judiciary to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be a variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute; the intention of the people to the intention of their agents. "Nor does this doctrine by any means," he said, "suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate

[1] "The Federalist," No. 78 (Dawson's ed.).

their decisions by the fundamental laws, rather than by those which are not fundamental." [1]

Reasoning of Marshall in the Case of Marbury *v.* Madison

Chief Justice Marshall, in the case of Marbury *v.* Madison, decided in 1803, analyzed the question in all its bearings and with the logic and insight of which he was a master. Following up Hamilton's argument, he showed that the limitations of a written constitution could have no meaning if those upon whom they were imposed were left free to judge of their nature and extent. There must be some supreme authority other than that which is limited, capable of judging in such cases and with power to compel respect for the limitations. Speaking of the government of the United States, he said: "The powers of the legislature are defined and limited; and that these limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. . . . The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power, in its own nature illimitable." The great chief justice concluded that "it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule.

[1] "The Federalist" (Dawson's ed.), p. 542.

If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution,—if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law — the courts must determine which of these conflicting rules govern the case. This is the very essence of judicial duty. If, then, the courts are to regard the constitution and the constitution is superior to any ordinary act of the legislature, the constitution and not such ordinary act must govern the case to which they both apply." [1]

"The courts," said the late Judge Cooley, "sit not to review or revise the legislative action, but to enforce the legislative will; and it is only where they find that the legislature has failed to keep within the constitutional limits

[1] "The power of interpreting the laws," observes Judge Story, "involves necessarily the function to ascertain whether they are conformable to the constitution or not; and if not so conformable, to declare them void and inoperative. So the constitution is the supreme law of the land; in a conflict between that and the laws, either of Congress or of the state, it becomes the duty of the judiciary to follow that only which is of paramount obligation. This results from the very theory of a republican constitution of government; for otherwise the acts of the legislature and executive would in effect become supreme and uncontrollable, notwithstanding any prohibition or limitations contained in the constitution; and usurpation of the most unequivocal and dangerous character might be assumed without any remedy within the reach of the citizens." See also Kent (Commentaries, vol. I, p. 449), who declares that "it belongs to the judicial power as a matter of right and duty to declare every act of the legislature made in violation of the constitution, or of any provision of it, null and void." "This great question," he concludes, "may now be regarded as finally settled and I consider it to be one of the most interesting points in favor of constitutional liberty and of the security of property in this country, that has ever been judicially determined." See also Dicey ("Law of the Constitution," p. 125), who in discussing the excellence of this principle declares that it "makes the judges the guardians of the constitution and provides the only safeguard which has hitherto been invented against unconstitutional legislation." For a scholarly essay by the late James B. Thayer on the origin and history of the American doctrine of the right of the courts to declare acts of the legislature unconstitutional, see the "Harvard Law Review," vol. VII; also printed in Thayer's "Legal Essays" (1908). See also Rawle, "On the Constitution," ch. 21; and Wilson, "Law Lectures," vol. I, pp. 460 *et seq.*

that they are at liberty to disregard its action; and in doing so they only do what every private citizen may do in respect to the mandates when the judges assume to act and to render judgment or decrees without jurisdiction. In exercising this high authority the judges claim no judicial supremacy, they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law." [1]

Conclusions

This view of the matter has been generally concurred in by American jurists; and American courts have, as has been said, universally acted in accordance with it, though in the early part of the last century there were protests here and there, and in some cases judges who assumed the power of setting aside acts of the legislature were removed from office by impeachment proceedings or by legislative acts abolishing the courts of which they were members.[2] The excellence of the rule is now admitted by nearly all American jurists and political writers, by many in England, and by some on the continent of Europe. It gives to the judiciary an importance in the political system of the country which it enjoys in no other country of the world. It makes of the governmental system of the United States what a distinguished writer has described as an "aristocracy of the

[1] "Constitutional Limitations," 7th ed., p. 228.

[2] For examples of some of these instances, see Baldwin, "American Judiciary," pp. 108–118. The judges who gave the opinion in the case of Trevett *v.* Weeden referred to above were impeached for refusing to enforce the statute in question, but they were not convicted. Nevertheless, the legislature refused to reëlect them when their terms expired and supplanted them with "pliant tools by whose assistance paper money was forced into circulation and public and private debts extinguished by means of it." For other cases of impeachment of judges for refusing to give effect to unconstitutional statutes, see Cooley, "Constitutional Limitations," pp. 229–230.

robe." [1] In no other country is the restraining and compelling power of the judiciary so often invoked, and nowhere else are its decisions held in such great respect by the masses. The peculiar power of setting aside the acts of the legislature, however, gives to the judiciary immense political influence as well as judicial power. This fact was dwelt upon by De Tocqueville, who saw in the practice more good than evil. Nevertheless he said, "I am inclined to believe that it is at once the most favorable to liberty as well as to public order and forms one of the most powerful barriers which have ever been devised against the tyranny of political assemblies." [2]

[1] Burgess, "Political Science and Constitutional Law," vol. II, p. 365.

[2] "Democracy in America," vol. I, ch. 6. The act of declaring a legislative act unconstitutional is a delicate proceeding, and should be entered upon by the courts with reluctance and hesitation, since it involves an overruling of the deliberate and matured will of a coördinate department and presupposes that the legislature has either deliberately, or through want of deliberation and judgment, disregarded the limitations imposed upon its authority by the constitution. The American courts have therefore developed certain rules of procedure which they usually follow in the performance of so solemn an act. Among these are the following: they will not decide an act to be unconstitutional by a mere majority of a quorum, but will postpone action until there is a full bench present; they will not decide a statute to be unconstitutional unless a decision on the question of constitutionality is necessary to the determination of the cause, but will, when possible, dispose of it upon some other ground; they will not listen to an objection raised against the constitutionality of a statute by a party whose rights are not directly involved and who has, therefore, no interest in having it set aside; nor will they declare a statute unconstitutional solely because it is unjust or oppressive in some of its provisions, or because it violates the supposed natural rights of the citizen, or some fundamental principle of republican government, or the supposed "spirit" of the constitution. Moreover, they will annul only the objectionable part of the statute when the rest of it can stand alone unaffected by the part which is overruled. Where there is a reasonable doubt as to the unconstitutionality of the statute or any part of it, the doubt will be resolved in favor of the legislative action and the law will be sustained. Finally, when a statute is declared unconstitutional, it is treated as if it had never been enacted; contracts dependent upon it for their validity are of no force; rights built up on it fall to the ground; no one can be punished for having refused obedience to it and it affords no protection to those who have acted under it. For a full discussion of these rules, see Cooley, "Constitutional Limitations," pp. 230–261.

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